No. 8413

In the United States Circuit Court of Appeals

For the Ninth Circuit.

MRS. ADAH ALBERTY, trading as ALBERTY FOOD LABORATORIES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker & Baird Company, Law Printers, Los Angeles.

No.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Appellant:

KELLOGG & MATLIN, Esqs.,

HIRAM T. KELLOGG, Esq.,

606 South Hill Street

Los Angeles, California.

For Appellee:

PEIRSON M. HALL, Esq.,

United States Attorney,

HOWELL PURDUE, Esq.,

Assistant United States Attorney,

M. G. GALLAHER, Esq.,

Assistant United States Attorney,

Federal Building,

Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

-o0o-

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 12,177-(J)-C-Crim.
MRS. ADAH ALBERTY, trading as ALBERTY FOOD LABORATORIES, Defendant.	)	

-o0o-

STATEMENT OF DOCKET ENTRIES

UNDER RULE IV

of the

UNITED STATES SUPREME COURT

-o0o-

(1) Information for violation of the Food and Drugs Act, filed October 31, 1934.

(2) Defendant arraigned January 14, 1935, and plea of Not Guilty was entered.

(3) Trial by jury December 3, 4, 7, 8, 9 and 10, 1936.

(4) Verdict of Guilty entered by the jury under date of December 10, 1936.

(5) Defendant sentenced to pay a fine unto the United States of America in the sum of $100 on each of the ten counts of the Information, and stand committed to the custody of the U. S. Marshal until paid, and in addition thereto pay costs of prosecution in accord with Cost Bill to be filed.

(6) Notice of Appeal filed December 15, 1936.

DATED: December 16, 1936.

Attest, R. S. Zimmerman, Clerk U. S. District Court, Southern District of California By Edmund L. Smith, Deputy

F. & D. No. 32879 Bond $500 B/W

IN THE DISTRICT COURT OF THE UNITED STATES WITHIN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

United States of America	)	
	)	Information
v.	)	
	)	No. 12177-J
Mrs. Adah Alberty, trading as	)	
Alberty Food Laboratories	)	September Term, 1934.

PEIRSON M. HALL, Attorney for the United States in and for the Southern District of California, who for the said United States in this behalf prosecutes, in his own proper person comes into Court on this 30th day of October, A. D., nineteen hundred and thirty-four, and with leave of Court first had and obtained, gives the Court here to understand and be informed, to wit:

That Mrs. Adah Alberty, trading as Alberty Food Laboratories, at Hollywood, State of California, did, within the Central Division of the Southern Judicial District of California, and within the jurisdiction of this Court, on or about the 25th day of March, in the year nineteen hundred and thirty-two, then and there, in violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act (34 Statutes at Large, 768), as amended by the Act of August 23, 1912 (37 Statutes at Large, 416, U. S. C. Title 21, Secs. 2 & 10), unlawfully ship and deliver for shipment, under the name of U. S. Okey, from Hollywood, State of California, to Philadelphia, State of Pennsylvania, consigned to U. S. Okey, certain packages,

to wit, a number of bottles, containing an article designed and intended to be used in the cure, prevention and mitigation of diseases of man, that is to say, a certain article of drugs, bearing statements, designs and devices regarding its therapeutic and curative effects, and labeled, marked and branded on the said bottles as follows, to wit:

CHIEF REMEDY FOR THE GROWING ORGANISM AND FOR CORRECTING CONSTITUTIONAL DEFECTS	ALBERTY'S CALCATINE A Cell and Tissue Salts App. 250 Pellets ————	DOSAGE Take 3 pellets every 2 hours for first 30 days then 3 pellets before meals. Dissolve on the tongue. Babies—1 pellet in each bottle.

USES—Acidosis, indigestion, calcium starvation, diarrhea, brain irritation, teething children. A TONIC after acute diseases and for constitutional weaknesses, emaciation, bone diseases, scrofulous and tubercular tendencies.

———

Alberty's Food Laboratories
Los Angeles

That said article of drugs, when shipped and delivered for shipment as aforesaid was, then and there, misbranded within the meaning of the said Act of Congress, as amended, in that the statements, designs and devices regarding the therapeutic and curative effects thereof, appearing on the labels of the bottles as aforesaid, were false and fraudulent, in this, that the same were applied to said article knowingly, and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and

fraudulently to purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that the article was, in whole or in part, composed of, or contained, ingredients or medicinal agents effective, among other things, as a cell and tissue salts; and effective as a remedy for the growing organism; and as a corrective for constitutional defects; effective as a treatment, remedy and cure for acidosis, indigestion, calcium starvation, diarrhea, brain irritation and teething in children; and effective as a tonic in acute diseases, constitutional weaknesses, emaciation, bone diseases, scrofulous and tubercular tendencies; when, in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a cell and tissue salts; or effective as a remedy for the growing organism; or as a corrective for constitutional defects; or effective as a treatment, remedy or cure for acidosis, indigestion, calcium starvation, diarrhea, brain irritation or teething in children; or effective as a tonic in acute diseases, constitutional weaknesses, emaciation, bone diseases, scrofulous or tubercular tendencies; all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT II

And the said United States Attorney, in manner and form as aforesaid, also gives the Court here to understand and be informed that Mrs. Adah Alberty, trading as Alberty Food Laboratories, at Hollywood, State of California, did, within the Central Division of the Southern Judicial District of California, and within the juris-

diction of this Court, on or about the 11th day of February, in the year nineteen hundred and thirty-three, then and there, in violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act (34 Statutes at Large, 768, as amended by the act of August 23, 1912 (37 Statutes at Large 416, U. S. C. Title 21, Secs. 2 and 10), unlawfully ship and deliver for shipment, under the name of U. S. Okey, from Hollywood, State of California, to Philadelphia, State of Pennsylvania, consigned to U. S. Okey, certain packages, to wit, a number of bottles, containing an article designed and intended to be used in the cure, prevention and mitigation of diseases of man, that is to say, a certain article of drugs, bearing statements, designs and devices regarding its therapeutic and curative effects, and labeled, marked and branded on the said bottles as follows, to wit:

FOR MALARIAL DISORDERS BILIOUSNESS AND DISEASES OF THE LIVER, URIC ACID DIATHESIS

ALBERTY'S LIVER CELL SALTS

Take 3 pellets every two hours for the first 30 days, then take 3 pellets before each meal and on going to bed.

Dissolve on the tongue.

USES—Ailments marked by excessive secretions of bile and derangement of the liver, gravel, sand in the uterine, biliousness, headache with vomiting of bile, bitter taste, diabetes, trouble arising from living in damp places, malaria, gout.

ALBERTY FOOD LABORATORIES
328 W. H. Hellman Building
Los Angeles

That said article of drugs, when shipped and delivered for shipment as aforesaid, was, then and there, misbranded within the meaning of the said Act of Congress, as amended, in that the statements, designs and devices regarding the therapeutic and curative effects thereof, appearing on the labels of the bottles as aforesaid, were false and fraudulent, in this, that the same were applied to said article knowingly, and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that the article was, in whole or in part, composed of, or contained, ingredients or medicinal agents effective, among other things, as a treatment, remedy and cure for malarial disorders, biliousness and diseases of the liver, and uric acid diathesis, and for ailments marked by excessive secretions of bile and derangement of the liver, gravel, sand in the uterine, biliousness, headache with vomiting of bile, bitter taste, diabetes, trouble arising from living in damp places, malaria, and gout; when, in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a treatment, remedy or cure for malarial disorders, biliousness or diseases of the liver, or uric acid diathesis, or for ailments marked by excessive secretions of bile and derangement of the liver, gravel, sand in the uterine, biliousness, headache with vomiting of bile, bitter taste, diabetes, trouble arising from living in damp places, malaria, or gout; all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT III

And the said United States Attorney, in manner and form as aforesaid, also gives the Court here to understand and be informed that Mrs. Adah Alberty, trading as Alberty Food Laboratories, at Hollywood, State of California, did, within the Central Division of the Southern Judicial District of California, and within the jurisdiction of this Court, on or about the 25th day of March, in the year nineteen hundred and thirty-three, then and there, in violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act (34 Statutes at Large, 768), as amended by the Act of August 23, 1912 (37 Statutes at Large, 416, U. S. C. Title 21, Secs. 2 & 10), unlawfully ship and deliver for shipment, under the name of U. S. Okey, from Hollywood, State of California, to Philadelphia, State of Pennsylvania, consigned to U. S. Okey, certain packages, to wit, a number of bottles, containing an article designed and intended to be used in the cure, prevention and mitigation of diseases of man, that is to say, a certain article of drugs, bearing statements, designs and devices regarding its therapeutic and curative effects, and labeled, marked and branded on the said bottles as follows, to wit:

DOSAGE Take 3 pellets every 2 hours for first 30 days then 3 pellets before meals. Dissolve on the tongue. Babies—1 pellet in each bottle.	ALBERTY'S CALCATINE Different Elements Organic Calcium App. 250 Pellets	DOSAGE Take 3 pellets every 2 hours for first 30 days then 3 pellets before meals. Dissolve on the tongue. Babies—1 pellet in each bottle.

Calcium elements combined in an organic form. Especially useful in Calcium Deficiency.

AIDS acidosis, teeth, bones, etc. May be taken indefinitely with benefit.

Alberty's Food Laboratories
729 Seward St.—Hollywood, Calif.

That said article of drugs, when shipped and delivered for shipment as aforesaid, was, then and there, misbranded within the meaning of the said Act of Congress, as amended, in that the statements, designs and devices regarding the therapeutic and curative effects thereof, appearing on the labels of the bottles as aforesaid, were false and fraudulent, in this, that the same were applied to said article knowingly, and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that the article was, in whole or in part, composed of, or contained, ingredients or medicinal agents effective, among other things, as a treatment, remedy and cure for calcium deficiency, and effective as an aid in the treatment of acidosis and ailments of the teeth and bones; when, in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a treatment, remedy or cure for calcium deficiency, or effective as an aid in the treatment of acidosis or ailments of the teeth and bones; all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT IV

And the said United States Attorney, in manner and form as aforesaid, also gives the Court here to understand and be informed that Mrs. Adah Alberty, trading as Alberty Food Laboratories, at Hollywood, State of California, did, within the Central Division of the Southern Judicial District of California, and within the jurisdiction of this Court, on or about the 4th day of March, in the year nineteen hundred and thirty-three, then and there, in violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act (34 Statutes at Large, 768), as amended by the Act of August 23, 1912 (37 Statutes at Large, 416, U. S. C. Title 21, Secs. 2 & 10), unlawfully ship and deliver for shipment, under the name of U. S. Okey, from Hollywood, State of California, to Philadelphia, State of Pennsylvania, consigned to Thos. Martindale & Company, certain packages, to wit, a number of bottles, containing an article designed and intended to be used in the cure, prevention and mitigation of diseases of man, that is to say, a certain article of drugs, bearing statements, designs and devices regarding its therapeutic and curative effects, and labeled, marked and branded on the said bottles as more fully described in the third count of this information, which said description in said third court is, by reference, hereby incorporated in this count.

That said article of drugs, when shipped and delivered for shipment as aforesaid, was, then and there, misbranded within the meaning of the said Act of Congress, as amended, in that the statements, designs and devices regarding the therapeutic and curative effects thereof, appearing on the labels of the bottles as aforesaid, were false

and fraudulent, in this, that the same were applied to said article knowingly, and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that the article was, in whole or in part, composed of, or contained, ingredients or medicinal agents effective, among other things, as a treatment, remedy and cure for calcium deficiency, and effective as an aid in the treatment of acidosis and ailments of the teeth and bones; when, in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a treatment, remedy or cure for calcium deficiency, or effective as an aid in the treatment of acidosis or ailments of the teeth and bones; all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT V

And the said United States Attorney, in manner and form as aforesaid, also gives the Court here to understand and be informed that Mrs. Adah Alberty, trading as Alberty Food Laboratories, at Hollywood, State of California, did, within the Central Division of the Southern Judicial District of California, and within the jurisdiction of this Court, on or about the 4th day of March, in the year nineteen hundred and thirty-three, then and there, in violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act (34 Statutes at Large, 768), as amended by the Act of August 23, 1912 (37 Statutes at Large, 416, U. S. C. Title 21, Secs. 2 & 10), unlaw-

fully ship and deliver for shipment, under the name of U. S. Okey, from Hollywood, State of California, to Philadelphia, State of Pennsylvania, consigned to Thos. Martindale & Company, certain packages, to wit, a number of bottles, containing an article designed and intended to be used in the cure, prevention and mitigation of diseases of man, that is to say, a certain article of drugs, bearing statements, designs and devices regarding its therapeutic and curative effects, and labeled, marked and branded on the said bottles as follows, to wit:

PELLETS
MAY BE
THESE
USED
INDEFI-
NITELY
WITH
BENEFIT

ALBERTY'S
LEBARA
ORGANIC
PELLETS
Formerly
LIVER CELL
SALTS

App. 250 Pellets

Take 3 pellets every two hours for the first 30 days, then take 3 pellets before each meal and on going to bed.
Dissolve on the tongue.

Aids Acidosis, Dormant Liver, Bile Secretions, Clearing the Complexion. Not a Laxative.

Alberty Food Laboratories
729 Seward St.—Hollywood, Calif.

That said article of drugs, when shipped and delivered for shipment as aforesaid was, then and there, misbranded within the meaning of the said Act of Congress, as amended, in that the statements, designs and devices regarding the therapeutic and curative effects thereof, appearing on the labels of the bottles as aforesaid, were false and fraudulent, in this, that the same were applied to said article knowingly, and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraud-

ulently to purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that the article was, in whole or in part, composed of, or contained, ingredients or medicinal agents effective, among other things, as a liver cell salts; and effective as an aid in the treatment of acidosis, dormant liver, bile secretions, and in clearing the complexion; when, in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a liver cell salts; or effective as an aid in the treatment of acidosis, dormant liver, bile secretions, or in clearing the complexion; all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT VI

And the said United States Attorney, in manner and form as aforesaid, also gives the Court here to understand and be informed that Mrs. Adah Alberty, trading as Alberty Food Laboratories, at Hollywood, State of California, did, within the Central Division of the Southern Judicial District of California, and within the jurisdiction of this Court, on or about the 23d day of December, in the year nineteen hundred and thirty-two, then and there, in violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act (34 Statutes at Large, 768), as amended by the Act of August 23, 1912 (37 Statutes at Large, 416, U. S. C. Title 21, Secs. 2 & 10), unlawfully ship and deliver for shipment, under the name of U. S. Okey, via Pacific Steamship Company, a corporation, a common carrier, from Wilmington, State

of California, to Seattle, State of Washington, consigned to Bartell Drug Company, Inc., certain packages, to wit, a number of bottles, containing an article designed and intended to be used in the cure, prevention and mitigation of diseases of man, that is to say, a certain article of drugs, bearing statements, designs and devices regarding its therapeutic and curative effects, and labeled, marked and branded on the said bottles as more fully described in the third count of this information, which said description in said third count is, by reference, hereby incorporated in this count.

That said article of drugs, when shipped and delivered for shipment as aforesaid was, then and there, misbranded within the meaning of the said Act of Congress, as amended, in that the statements, designs and devices regarding the therapeutic and curative effects thereof, appearing on the labels of the bottles as aforesaid, were false and fraudulent, in this, that the same were applied to said article knowingly, and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that the article was, in whole or in part, composed of, or contained, ingredients or medicinal agents effective, among other things, as a treatment, remedy and cure for calcium deficiency, and effective as an aid in the treatment of acidosis and ailments of the teeth and bones; when, in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a treatment, remedy or cure for calcium deficiency, or effective as an aid in the treatment of acidosis or ailments

of the teeth and bones; all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT VII

And the said United States Attorney, in manner and form as aforesaid, also gives the Court here to understand and be informed that Mrs. Adah Alberty, trading as Alberty Food Laboratories, at Hollywood, State of California, did, within the Central Division of the Southern Judicial District of California, and within the jurisdiction of this Court, on or about the 26th day of January, in the year nineteen hundred and thirty-three, then and there, in violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act (34 Statutes at Large, 768), as amended by the Act of August 23, 1912 (37 Statutes at Large, 416, U. S. C. Title 21, Secs. 2 & 10), unlawfully ship and delivery for shipment, via parcel post, from Hollywood, State of California, to Seattle, State of Washington, consigned to Bartell Drug Company, Inc., certain packages, to wit, a number of bottles, containing an article designed and intended to be used in the cure, prevention and mitigation of diseases of man, that is to say, a certain article of drugs, bearing statements, designs and devices regarding its therapeutic and curative effects, and labeled, marked and branded on the said bottles as more fully described in the third count of this information, which said description in said third count is, by reference, hereby incorporated in this count.

That said article of drugs, when shipped and delivered for shipment as aforesaid was, then and there, mis-

branded within the meaning of the said Act of Congress, as amended, in that the statements, designs and devices regarding the therapeutic and curative effects thereof, appearing on the labels of the bottles as aforesaid, were false and fraudulent, in this, that the same were applied to said article knowingly, and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that the article was, in whole or in part, composed of, or contained, ingredients or medicinal agents effective, among other things, as a treatment, remedy and cure for calcium deficiency, and effective as an aid in the treatment of acidosis and ailments of the teeth and bones; when, in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a treatment, remedy or cure for calcium deficiency, or effective as an aid in the treatment of acidosis or ailments of the teeth and bones; all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT VIII

And the said United States Attorney, in manner and form as aforesaid, also gives the Court here to understand and be informed that Mrs. Adah Alberty, trading as Alberty Food Laboratories, at Hollywood, State of California, did, within the Central Division of the Southern Judicial District of California, and within the jurisdiction of this Court, on or about the 1st day of Novem-

ber, in the year nineteen hundred and thirty-two, then and there, in violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act (34 Statutes at Large, 768), as amended by the Act of August 23, 1912 (37 Statutes at Large, 416, U. S. C. Title 21, Secs. 2 & 10), unlawfully ship and deliver for shipment, under the name of U. S. Okey, from Hollywood, State of California, to Philadelphia, State of Pennsylvania, consigned to U. S. Okey, certain packages, to wit, a number of boxes, containing an article designed and intended to be used in the cure, prevention and mitigation of diseases of man, that is to say, a certain article of drugs, bearing statements, designs and devices regarding its therapeutic and curative effects, and labeled, marked and branded on the said boxes as follows, to wit:

ALBERTY'S
Anti-Diabetic
Vegetable Compound Capsules
Fifty-four 00 Capsules, 9 Days' Treatment
Price $1.50
Dosage: Take 2 Capsules just after each meal
Manufactured for
The Alberty Food Laboratories
729 Seward St., Hollywood, Calif.

That said article of drugs, when shipped and delivered for shipment as aforesaid was, then and there, misbranded within the meaning of the said Act of Congress, as amended, in that the statements, designs and devices regarding the therapeutic and curative effects thereof, appearing on the labels of the boxes as aforesaid, were false and fraudulent, in this, that the same were applied to said

article knowingly, and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that the article was, in whole or in part, composed of, or contained, ingredients or medicinal agents effective, among other things, as a treatment, remedy and cure for diabetes; when, in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a treatment, remedy or cure for diabetes; all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT IX

And the said United States Attorney, in manner and form as aforesaid, also gives the Court here to understand and be informed that Mrs. Adah Alberty, trading as Alberty Food Laboratories, at Hollywood, State of California, did, within the Central Division of the Southern Judicial District of California, and within the jurisdiction of this Court, on or about the 24th day of October, in the year nineteen hundred and thirty-two, then and there, in violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act (34 Statutes at Large, 768), as amended by the Act of August 23, 1912 (37 Statutes at Large, 416, U. S. C. Title 21, Secs. 2 & 10), unlawfully ship and deliver for shipment, under the name of U. S. Okey, from Los Angeles, State of California, to Philadelphia, State of Pennsylvania, consigned to U. S. Okey, certain packages, to wit, a number of boxes, con-

taining an article designed and intended to be used in the cure, prevention and mitigation of diseases of man, that is to say, a certain article of drugs, bearing statements, designs and devices regarding its therapeutic and curative effects, and labeled, marked and branded on the said boxes as more fully described in the eighth count of this information, which said description in said eighth count is, by reference, hereby incorporated in this count.

That said article of drugs, when shipped and delivered for shipment as aforesaid was, then and there, misbranded within the meaning of the said Act of Congress, as amended, in that the statements, designs and devices regarding the therapeutic and curative effects thereof, appearing on the labels of the boxes as aforesaid, were false and fraudulent, in this, that the same were applied to said article knowingly, and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that the article was, in whole or in part, composed of or contained, ingredients or medicinal agents effective, among other things, as a treatment, remedy and cure for diabetes; when in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a treatment, remedy or cure for diabetes; all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT X

And the said United States Attorney, in manner and form as aforesaid, also gives the Court here to understand and be informed that Mrs. Adah Alberty, trading as Alberty Food Laboratories, at Hollywood, State of California, did, within the Central Division of the Southern Judicial District of California, and within the jurisdiction of this Court, on or about the 5th day of April, in the year nineteen hundred and thirty-three, then and there, in violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act (34 Statutes at Large, 768), as amended by the Act of August 23, 1912 (37 Statutes at Large, 416, U. S. C. Title 21, Secs. 2 & 10), unlawfully ship and deliver for shipment from Hollywood, State of California, to Minneapolis, State of Minnesota, consigned to J. G. Pavo, certain packages, to wit, a number of boxes, containing an article designed and intended to be used in the cure, prevention and mitigation of diseases of man, that is to say, a certain article of drugs, bearing statements, designs and devices regarding its therapeutic and curative effects, and labeled, marked and branded on the said boxes as more fully described in the eighth count of this information, which said description in said eighth count is, by reference, hereby incorporated in this count.

That said article of drugs, when shipped and delivered for shipment as aforesaid was, then and there, misbranded within the meaning of the said Act of Congress, as amended, in that the statements, designs and devices

regarding the therapeutic and curative effects thereof, appearing on the labels of the boxes as aforesaid, were false and fraudulent, in this, that the same were applied to said article knowingly, and in reckless and wanton disregard of their truth or falsity, so as to represent falsely and fraudulently to purchasers thereof, and create in the minds of purchasers thereof the impression and belief, that the article was, in whole or in part, composed of, or contained, ingredients or medicinal agents effective, among other things, as a treatment, remedy and cure for diabetes; when, in truth and in fact, said article was not, in whole or in part, composed of, and did not contain, ingredients or medicinal agents effective, among other things, as a treatment, remedy or cure for diabetes; all of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Peirson M. Hall,
United States Attorney in and for the
Southern District of California
by Wm Fleet Palmer, Asst.

UNITED STATES OF AMERICA)
) SS
Southern District of California)

WM. FLEET PALMER, being first duly sworn on oath, says: that he has read the foregoing information and that the matters contained therein are true in substance and in fact.

Wm Fleet Palmer

Subscribed and sworn to before me this 31st day of October, 1934.

[Seal] R. S. Zimmerman,
Clerk U. S. District Court, Southern District of California
By L. Wayne Thomas Deputy

[By stipulation the exhibits attached to the original information have been omitted. The stipulation is printed at the end of this record on appeal.]

[Endorsed]: 1/14/35—Arr. T/N—plea N/G R. S. Zimmerman, Clerk U. S. District Court, Southern District of California By J. M. Horn Deputy Filed Oct 31 1934 R. S. Zimmerman, Clerk By Murray E Wire Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Monday, the 14th day of January, in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable WM. P. JAMES, District Judge.

United States of America.	)	
	)	
Plaintiff,	)	
vs.	)	No. 12177-J-Crim.
Mrs. Adah Alberty, trading as Alberty Food Laboratories,	)	
	)	
Defendant,	)	

This cause coming on for arraignment and plea; H. Purdue, Assistant U. S. Attorney, appearing for the Government; Ames Peterson, Esq., appearing for defendant, Mrs. Adah Alberty, who is present;

Defendant states her true name to be as given in the Information, waives reading thereof, and enters her plea of Not Guilty; whereupon, the cause is ordered continued to May 27, 1935, 2 O'clock p. m., for setting for trial.

At a stated term, to wit: The September Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Thursday, the 3rd day of December, in the year of our Lord one thousand nine hundred and thirty-six.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America Plaintiff, *vs.* Mrs. Adah Alberty, trading as Alberty Food Laboratories, Defendant.	)	No. 12177-C-Crim.

This cause coming on for trial by jury; M. G. Gallaher, Assistant U. S. Attorney, and Howell Purdue, Assistant U. S. Attorney, appearing as counsel for the Government; defendant Mrs. Adah Alberty being present in court with her attorney, Hiram T. Kellogg, Esq., and the case being called at ten o'clock a. m., A. M. Randol being present as official court reporter,

Howell Purdue, Esq., makes a statement; Hiram T. Kellogg, Esq., makes a statement, and the Court orders a jury drawn, whereupon, the following names are drawn: Robert S. Campbell, Harlow B. Potter, Willis L. Gregory, Fred W. Sauer, William B. Banning, Harry F. Henderson, F. M. Goss, Robert H. Moulton, Joseph C. Sloane, C. S. Bailes, Robert H. Orr and Arthur W. Larson;

And the twelve jurors whose names are drawn, taking their seats in the jury box, are examined for cause by the Court, by Howell Purdue, Esq., and by Hiram T. Kellogg, Esq., and Joseph C. Sloane being excused for cause, the Clerk draws the name of Wm. M. Glassell, who is examined for cause by the Court and by Howell Purdue, Esq., and is excused on defendant's peremptory challenge, whereupon, the name of W. G. Jordan is drawn by the Clerk, and said juror is examined for cause by the Court, by Howell Purdue, Esq., and by Hiram T. Kellogg, Esq., and C. S. Bailes being excused on defendant's peremptory challenge, the Clerk draws the name of Sheldon C. Potter, who is examined for cause by the Court, by Howell Purdue, Esq., and by Hiram T. Kellogg, Esq., and Harry F. Henderson is excused on defendant's peremptory challenge, whereupon, the Clerk draws the name of Edward H. Dunk, who is examined for cause by the Court and by Howell Purdue, Esq., and there being no further challenges, the jurors now in the box are sworn in a body as the jury to try this cause, said jury being as follows, to-wit:

THE JURY

Robert S. Campbell	F. M. Goss
Harlow B. Potter	Robert H. Moulton
Willis L. Gregory	W. G. Jordan
Fred W. Sauer	Sheldon C. Potter
William B. Banning	Robert H. Orr
Edward H. Dunk	Arthur W. Larson

Now, at the hour of 10:33 a. m., the Court admonishes the jury that during the progress of this trial they are not to speak to anyone, or permit anyone to speak to them about this cause, or any matter or thing therewith connected; that until said cause is finally submitted to them for their deliberation under the instruction of the Court, they are not to speak to each other about this cause, or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally submitted to them; and the jury are excused to ten o'clock a. m., December 4th, to which time the cause is continued for further proceedings on trial.

At a stated term, to wit: The September Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Thursday, the 10th day of December, in the year of our Lord one thousand nine hundred and thirty-six.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America,	)	
	)	
Plaintiff,	)	
vs.	)	No. 12177-C-Crim.
	)	
Mrs. Adah Alberty, etc.	)	
	)	
Defendant.	)	

This cause coming on for further proceedings on trial; Howell Purdue, Assistant U. S. Attorney, appearing for the Government, and Hiram T. Kellogg, Esq., appearing for the defendant, who is present; A. M. Randoll being present as official court reporter; at 10:00 a. m., court reconvenes in this cause, and the jury being present, it is ordered to proceed,

Mrs. Adah Alberty, defendant, resumes the stand and testifies further on examination by Howell Purdue, Esq., and there is offered, admitted in evidence, and marked:

Gov. Ex. 15: 4 photostatic copies of documents.

George P. Larrick, a government witness, is recalled and testifies further on examination by counsel for the government and the defendant, respectively; whereupon, at 10:28 a. m. the Government rests.

[Title of Court and Cause.]

VERDICT OF THE JURY

We, the jury in the above entitled case, find the defendant, Mrs. Adah Alberty, trading as Alberty Food Laboratories:

Guilty as charged in the first count of the Information;

Guilty as charged in the second count of the Information;

Guilty as charged in the third count of the Information;

Guilty as charged in the fourth count of the Information;

Guilty as charged in the fifth count of the Information;

Guilty as charged in the sixth count of the Information;

Guilty as charged in the seventh count of the Information;

Guilty as charged in the eighth count of the Information;

Guilty as charged in the ninth count of the Information; and

Guilty as charged in the tenth count of the Information.

Dated: Los Angeles, Calif., December 10th, 1936.

H. B. Potter

Foreman of the Jury.

[Endorsed]: Filed Dec 10 1936 R. S. Zimmerman, Clerk, By Francis E. Cross, Deputy Clerk.

[Title of Court and Cause.]

MOTION FOR A NEW TRIAL

Comes now the defendant, Adah Alberty, within the time allowed by law, and by leave of Court, moves this Court and brings and submits to the Court her motion for a new trial herein, and prays the Court to set aside the verdict heretofore rendered against her in this cause for the following reasons, to-wit:

1. Errors of law occurring at the trial and duly excepted to.

2. That the Court erred in admitting evidence of the witness, Larrick, over the objection of the defendant, and particularly that testimony of said witness wherein he testified regarding letters and booklets of which the defendant was purportedly the author.

3. That the Court erred in admitting evidence over the objection of the defendant of the authorship of the booklet, "Calcium, the Staff of Life," for the reason that said booklet contained irrelevant, incompetent and immaterial matter to the issues and in that no foundation was laid to show the time and place of obtaining said booklet with certainty, and in that the Government did specifically fail to prove that said booklet was at any time contained within the package of any of the articles sold in alleged violation of the law by reason of an alleged misbranding thereof. That the introduction of said booklet into evidence over the objection and exceptions of this defendant constituted prejudicial error and placed before the jury matters not directly relating to the issues of prejudice to this defendant.

4. That the Court erred in admitting evidence of the authorship by the defendant of the book, "The Hour Glass," in that no proper foundation was laid to show the time and place of the alleged receipt of said book by the witness for the Government and with particular reference to the time and place of the offenses charged in the information, and in that said book contained matters that were not related to and had no bearing upon the issues in this case, and the Court erred in admitting said book into evidence over the objection and exceptions of the defendant, and in permitting the attorney for the Government to read exerpts from the book regarding other articles or products manufactured by this defendant where there was no charge against her with relation to said products in any count of the information. That all of said evidence was introduced over the objection and exceptions of defendant and without a proper foundation being laid to show that said books were a part of the package or label of any of the articles or products with which the defendant is charged in the offenses stated in the information, and in that there was no showing that said book or any of the books introduced by the Government into evidence over defendant's objection were at any time part of the advertising matter delivered to purchasers of defendant's products at the time of any sale or offer for sale of the articles alleged to be misbranded. That all of said evidence, and evidence collateral thereto, was admitted over the persistant objection and exception of the defendant made at the time of trial. That all of said evidence was highly prejudicial to this defendant and prevent the defendant from having a fair trial of the issues by the jury.

5. That the Court erred in permitting the Assistant District Attorney for the United States, *Richard* Perdue,

to introduce into evidence on cross-examination, by his own manner of statement or putting of the question upon such cross-examination, a statement upon the part of said attorney of the amount of purported earnings of the defendant during the year when the charges against her are alleged to have occurred, and in putting such questions to her without evidence of such earnings to substantiate his contention, well knowing that said statements were incompetent, irrelevant and immaterial, and made without proper foundation upon his part. That the Court erred in allowing the said Deputy United States District Attorney to cross-examine the defendant by his own manner of statement in asking her whether or not she knew that others of her products not charged in the information had caused vomiting and sickness in babies, and that 150 of them had been taken to the Health Department of the City of Los Angeles, although said United States Deputy District Attorney well knew that such was not a true statement of fact, and that said statement was made for the purpose of prejudicing the jury against the defendant upon an irrelevant matter. That the Court erred in permitting the United States Deputy District Attorney to introduce into evidence statements of the cost to the defendant and statement of the price for sale by the defendant of the articles charged in the information for the purpose of showing a "tremendous profit" on such articles by the defendant. That the introduction of all of the said incompetent, irrelevant and immaterial testimony or statements by the said Deputy United States District Attorney constituted mis-conduct and prevented the de-

fendant from having a fair trial of the issues upon the charges in the information. That the introduction of said statements and said evidence over the objections and exceptions of the defendant noted to the rulings of the Court in that behalf were calculated to prejudice the minds of the jury against the defendant.

6. That the Court erred in its charge to the jury in reading as part of its comment upon the case the message of President Taft to Congress at the time of the presentation of the Shirley Amendment to the Food and Drugs Act, and that while no objection was taken thereto at the time and in the presence of the jury, that act upon the part of the Court, coupled with the instruction given to the jury upon its return from the jury room to which admittedly no proper exception was likewise taken, coupled with the entire manner in which the evidence for the Government was presented, has prevented the defendant from having a fair trial upon the issues set forth in the several counts of the information, and of the charges against her.

WHEREFORE, the defendant moves the above entitled Court upon the foregoing grounds for a new trial of the issues.

DATED this 14th day of December, 1936.

KELLOGG & MATLIN

By Hiram T. Kellogg

Attorneys for Defendant.

[Endorsed]: Filed Dec 14, 1936 R. S. Zimmerman Clerk By Francis E. Cross, Deputy Clerk.

[Title of Court and Cause.]

NOTICE OF MOTION FOR ARREST OF JUDGMENT

Comes now the defendant, Adah Alberty, and moves the Court to arrest the judgment in this cause for the following reasons, to-wit:

First: That the information in this case is insufficient in law for the reason that it wholly fails to allege or charge this defendant with facts constituting an offense against the laws of the United States of America in each and every one of the ten counts of the said information, and particularly does it fail to charge any offense against that Act of Congress of June 30, 1906, known as the Food and Drugs Act (34 Statutes at large, 768) as amended by the Act of August 23, 1912, (37 Statutes at large, 416, U. S. C. Title 21, Sections 2 and 10), all of the Criminal Code of Statutes of the United States.

Second: That upon the whole record the verdict of the jury and any judgment entered under it is and would be erroneous in that it nowhere appears that the defendant was actually guilty of a misbranding as defined in the law.

Third: That the information attempts to charge this defendant with a misdemeanor, viz., shipping in interstate commerce articles misbranded in violation of the Statutes aforesaid, and that the labels setting forth the alleged misbranding are specifically pleaded in the information and set forth therein, and upon the face thereof it appears that the articles are not misbranded as defined in the law and in the decisions of this Court.

Fourth: That the entire record in this case does upon the weight of the evidence and upon the face of the record

indicate that the verdict is contrary to the law and the evidence, and that a grave miscarriage of justice would result if the judgment were entered by the Court upon said verdict, and the defendant sentenced pursuant to the same.

Fifth: That the information is so vague, indefinite, equivocal, redundant and dul*p*icitous that the defendant was not advised with a certainty required by law with what she was charged. That it nowhere appears in the record or in the evidence that each and all of said shipments constitute separate shipments sufficient to warrant in any event the number of counts charged in the information.

Sixth: That upon the information and the record in this case, it does wholly appear, without any contradiction, that to and including the time of the charge made in the information the defendant had received no warning regarding the labels or of any failure to observe regulations, and that on the contrary it appears without contradiction from the record, and the whole thereof, that the defendant voluntarily appeared before the Department charged with the enforcement of the Food and Drugs Act, and placed the same before the Department for their information in good faith and such shipments were not made fraudulently in violation of law in any event.

WHEREFORE, this defendant prays the Court to arrest the judgment against her herein.

DATED this 12th day of December, 1936.

KELLOGG & MATLIN
By David A. Matlin
Attorneys for Defendant.

[Endorsed]: Filed Dec. 12, 1936, R. S. Zimmerman Clerk By J. M. Horn Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Monday, the 14th day of December, in the year of our Lord one thousand nine hundred and thirty-six.

Present:

The Honorable GEO. COSGRAVE, District Judge.

United States of America,	)	
	)	
Plaintiff,	)	
vs.	)	No. 12177-C-Crim.
	)	
Mrs. Adah Alberty, etc.	)	
	)	
Defendant.	)	

This cause coming on for (1) Hearing on motion of defendant, Adah Alberty for arrest of judgment, pursuant to notice thereof, filed December 12, 1936; (2) Sentence on the ten counts of the information; Howell Purdue, Assistant U. S. Attorney, appearing for the government, and Hiram T. Kellogg, Esq., appearing for the defendant Mrs. Adah Alberty, who is present; A. M. Randol being present as official court reporter;

At the request of Hiram T. Kellogg, Esq., it is ordered that motion of defendant for a new trial, heretofore noticed to be heard next Monday, December 21, 1936, be heard at this time, whereupon,

Hiram T. Kellogg, Esq., argues motion for a new trial;

Howell Purdue, Esq., argues in opposition thereto;

The Court orders motion of defendant for a new trial denied.

Hiram T. Kellogg, Esq., argues in support of motion of defendant for arrest of judgment;

Howell Purdue, Esq., argues in opposition thereto; whereupon,

The Court orders motion for arrest of judgment denied.

Sentence is now pronounced upon the defendant Mrs. Adah Alberty for the crime of which she stands convicted, namely: violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act, and it is the judgment of the Court that the said defendant pay a fine of $100.00 on each of the ten counts of the Information, and stand committed to the custody of the United States Marshal until said fine is paid; she is also adjudged to pay costs of the prosecution of the case,—that means the actual expense the Government has been put to by reason of the prosecution, in accordance with cost bill to be filed; Costs taxed at $1499.80.

Hiram T. Kellogg, Esq., gives notice of intention to file petition for appeal and asks for stay for forty-eight hours for the purpose of filing necessary documents in connection with her appeal;

Court orders motion to stay her being remanded to custody for forty-eight hours is denied, and the defendant is remanded to custody at this time, and appeal bond is fixed at this time at $1000.00.

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

Be it remembered that on the trial of this cause in said court at the September, 1936, term thereof, the Honorable George Cosgrave, judge of said court presiding, the following proceedings were had, to-wit:

A jury was duly impaneled on the 3d day of December, 1936, and after a recess, trial commenced December 4, 1936, Peirson M. Hall, United States Attorney, and Howell Purdue, Assistant United States Attorney, appearing as counsel for the plaintiff, and Hiram T. Kellogg, Esq., appearing as counsel for the defendant.

The case proceeded upon ten counts named in an Information charging the defendant with misbranding and violation of the Federal Food and Drugs Act.

An opening statement having been made by counsel for the plaintiff, the following proceedings were had, and the following evidence was received, to-wit:

A stipulation was read into evidence that the shipments of drugs set forth in the respective counts of the Information had been in fact made, and that samples thereof were collected by the United States Food and Drug Administration.

Government counsel offered in evidence the several labels referred to in the Information, which were admitted and marked respectively Government's Exhibits Nos. 1 to 9 inclusive; and were thereupon read to the jury as follows:

From Exhibit 1:

"Alberty's Calcatine, a cell and tissue salt, approximately 250 pellets.

"Chief remedy for the growing organism and for correcting constitutional defects.

"Dosage: Take three pellet*t*s every two hours for first 30 days, then three pellets before meals. Dissolve on the tongue. Babies—One pellet*t* in each bottle.

"Uses: Acidosis, indigestion, calcium starvation, diarrhea, brain irritations, teething children. A tonic after acute diseases and for constitutional weaknesses, emaciation, bone diseases, scrofulous and tubercular tendencies.

"Alberty's Food Laboratories, Los Angeles."

From Exhibit 2:

"Alberty's Liver Cell Salts, for malarial disorders, billiousness and diseases of the liver, uric acid, diathesis.

"Take three pellets every two hours for the first 30 days, then take three pellets before each meal and on going to bed. Dissolve on the tongue.

"Uses: Ailments marked by excessive secretions of the bile and derangement of the liver, gravel, sand in the uterine, billiousness, headache with vomiting of bile, bitter taste, diabet*i*s, trouble arising from living in damp places, malaria, gout.

"Alberty Food Laboratories, 328 H. W. Hellman Building, Los Angeles."

From Exhibit 3:

"Alberty's Calcatine, different elements, organic calcium, App. 250 pellets.

"Dosage: Take three pellets every two hours, for first 30 days; then three pellets before meals.

"Dissolve on the tongue.

"Babies: One pellet in each bottle.

"Calcium elements combined in organic form. Especially useful in calcium deficiency.

"Aids acidosis, teeth, bones, etc. May be taken indefinitely with benefit.

"Alberty's Food Laboratories, 729 Seward Street, Hollywood, California."

The material parts of Exhibit 4 were stated to be the same in wording as Exhibit 3.

Exhibit 5 was read to the jury as follows:

"Alberty's Lebara Organic Pellets, formerly Liver Cells. Approximately 250 pellets.

"These pellets may be used indefinitely with benefit.

"Take three pellets every two hours for the first 30 days, then take three pellets before each meal and on going to bed.

"Dissolve on the tongue.

"Aids acidosis, dormant liver, bile secretions, clearing the complexion. Not a laxative.

"Alberty's Food Laboratories, 729 Seward Street, Hollywood, California."

Exhibit 6; another Calcatine label, was stated to have the same wording as Exhibit 4.

Exhibit 7 was read as follows:

"Alberty's Anti-Diabetic Vegetable Compound Capsules, 50-4 0.0. Capsules, nine days' treatment, price $1.50.

"Dosage: Take two capsules just after each meal.

"Manufactured for the Alberty Food Laboratories, 729 Seward Street, Hollywood, California."

Exhibits 8 and 9 were stated to contain the same wording as Exhibit 7.

(Testimony of Albert J. Brown)

ALBERT J. BROWN

was called and sworn as a witness on behalf of the plaintiff, and testified as follows:

Direct Examination

by Mr. Purdue.

I am Chief Inspector for the Western District of the Food and Drug Administration; I was stationed in Portland, Oregon from 1921 to 1932, and in Seattle, Wash., from 1932 to 1935; since 1930 or 1931 I have been familiar with the pamphlet which you show me, "Calcium, the Staff of Life, by Adah Alberty."

Voir Dire Examination by Mr. Kellogg

This pamphlet was not contained in the bottles or package of any articles that the Government seized at any time; it was a pamphlet that was on the counters for distribution at places that stocked Alberty's foods.

Mr. Kellogg: Your Honor, we object to any testimony upon the document or pamphlet upon the ground it is not within the charge and not material. It is incompetent, irrelevant and immaterial; not proper evidence to be introduced on behalf of the government.

Direct Examination Continued.

About the year 1931 I saw these books in a dozen or more places that stocked so-called health foods, especially places that stocked Alberty's foods, for retail trade, at various cities, principally in Seattle and Portland.

The pamphlet was offered in evidence.

Mr. Kellogg: May I at this time renew and restate my objection?

The Court: Yes.

(Testimony of Albert J. Brown)

Mr. Kellogg: On the grounds, your Honor, it is incompetent, irrelevant and immaterial and not a part of—it is not shown to have been a part of the package charging the violations, and it is not a part of the Food and Drug Act here under discussion or here charged. It is collateral or outside advertising and is not a part of the label or the violation, and on that ground we object to the introduction of any collateral matter at this time, and upon the further ground that no proper foundation has been laid.

Thereupon the objection was overruled, the pamphlet was received in evidence as Government's Exhibit No. 10, and an exception was noted.

Government counsel then read from page 18 of the exhibit as follows:

"The diseases caused by disfunction of the liver are many and varied. What is acidosis? One of the ailments arising from a disfunction of the pancreas is that fatal and insidious disease, diabetes. One would never have tuberculosis or anemia if the spleen remained healthy. In cases of diabetes and anemia, the patient does not suspect there is anything wrong until he is in a most serious condition."

Government counsel, referring to pictures on page 45 of the exhibit, stated, "the same girl at different times, allegedly, and read therefrom as follows:

"13 years old. Height 4 feet, 9 inches; weight 77 pounds. Note facial expression."

Below the bottom picture is:

"14 years old. Height 5 feet. Weight 93 pounds. Her eyes are bright. Expression animated."

(Testimony of Albert J. Brown)

Then:

"June, since the age of two years, had not been robust. She grew slowly, had no appetite and suffered from malnutrition. Between the ages of 12 and 13 she had not gained any weight and grew less than one inch in height. At the age of 13 she started on the Alberty Treatment and gained seven pounds in weight and grew one inch in height in two months.

"In one year June had grown three inches in height and gained 16 additional pounds."

Cross Examination.

The pamphlets were usually on the counter; in some of those places there is a little box for free distribution and it says, "Take One"; it was always on the counter for distribution; I do not know where this particular pamphlet came from; I have seen similar ones; I did not pick this book up.

Redirect Examination.

I have seen the kind of book which you hand me, "The Hour Glass, What Time Does To Us by Adah M. Alberty"; I became aware of it practically at the same time I was aware of the other booklet because Mrs. Alberty was the author of "The Hour Glass", and then in some places where I have been in they have literature and a bracket saying that this book was for sale.

The book was offered in evidence, and was objected to on the grounds it was incompetent, irrelevant and immaterial, no proper foundation laid and not within the issues before the Court.

The offer was withdrawn and the book was received and marked as Government's Exhibit No. 11 for identification.

(Testimony of George P. Larrick)

Thereupon,

GEORGE P. LARRICK

was called and sworn as a witness on behalf of the plaintiff, and testified as follows:

I am Chief Inspector of the Food and Drug Administration; my offices are in Washington, D. C.; I know Mrs. Alberty and on September 4, 1934 at my office I had a conversation with her concerning books of the kind as Government's Exhibit No. 11 for identification.

Q. Now, tell the jury what was said concerning the book, "The Hour Glass"?

Mr. Kellogg: That is objected to upon the grounds it is incompetent, irrelevant and immaterial; no proper foundation laid and the conversation was in 1934, at a time after these alleged offenses, in Washington, are concerned, and the book has no bearing that I can see at this time upon the violation.

The objection was overruled and an exception noted.

(Here Government's Exhibit No. 11 for identification was received in evidence as Government's Exhibit No. 11.)

On September 4, 1934, Mrs. Alberty called at my office protesting against certain action that the Government had instituted, or was planning to institute to her knowledge, against her products; during the course of that conversation I pointed out to her in great detail, why the Government was bringing this action, and during the time of that conversation I displayed this book to her and read numerous portions of it to her to show that certain of the claims

(Testimony of George P. Larrick)

there were the basis of the action that we were bringing and certain of the claims which the Government had repeatedly told her were not justified in fact; I also discussed this little booklet with her and pointed out to her that this booklet contained many statements, descriptions and devices which, in the opinion of the Administration, were grossly in violation of the law; she agreed with me that she did use these booklets, generally, throughout the United States in health food stores in connection with the sale of her products and also that the booklet, "The Hourglass, What Time Does to Us," was on sale in a great many of these so-called health food stores throughout the country and that the book does make numerous statements telling how the medicines are to be used and what they are to be used for; in fact, explaining many of the things that appear on the labels of this product.

A motion that the testimony of the witness be stricken upon the grounds it was incompetent, irrelevant and immaterial and did not tend to prove any issues in the case, was denied and an exception noted.

Cross Examination.

I have talked to Mrs. Alberty twice about her products; the first conversation was on April 23, 1930; on the occasion of the September, 1934, conversation, she presented a letter she had written to Mr. W. G. Campbell, Chief, Drug Control, Washington, D. C., wherein she asked to discuss a letter from Mr. Campbell to Mr. Griffith Jones, her then attorney, of Los Angeles, California; the letter to Mr. Jones, of date August 15, 1934, read in part as follows:

(Testimony of George P. Larrick)

"All negotiations should be had with the United States Attorney who filed the libels or the informations. However, as you have apparently been misinformed regarding negotiations heretofore carried on between the manufacturer and the Administration, I shall inform you briefly as to the actual facts.

"With reference to the Calcatine product, the label for which you state was approved by Dr. Cullen, I am informed from our records that Dr. Cullen stated to Mr. Buckley, on May 29, 1933, that if this product were made to contain such calcium to warrant the statement that the article is indicated in conditions growing out of lack of calcium in the system, no objection would be made to the use of this preparation.

"One analysis of a sample taken from a consignment now under seizure, it was discovered that the article contains but a negligible amount of calcium.

"Referring to the Spleen and Iron Tablets, this article was the subject of a discussion between Mr. Millard F. West, an attorney for Mrs. Alberty, and representatives of the Administration on August 28, 1929. Mr. West was told that there was no evidence that spleen substances, when injected, has any influence on the spleen; that the reduced iron and strychnine sulphate, if present in sufficient proportions, would warrant reference to the article as an iron strychnine tonic, as a stomatic, and that beyond these limitations the labelling should not go and, in particular, that the 'Spleenatone' name was misleading.

"Mr. West suggested the name 'Pepagin' and 'Vita' and was told that there would be considerable objections,

(Testimony of George P. Larrick)

but that no objection would be taken to the name 'Alberty's Medicine".

"As late as July 12, 1933, Dr. Cullen wrote Mrs. Alberty, 'The value of your hemoglobin content, if it possesses any, would be derived from other ingredients contained therein, and the name of this preparation is misleading.'

"The same criticism applies to your Spleen and Iron Tablets. With regard to the Organic Phosphate Pellets, our files contain a letter dated June 7, 1933, from Mr. Buckley in which he listed a number of products, including Organic Phosphate Pellets, and stated that he had received copies of the labels for these from the Alberty Food Laboratories. He requested permission to submit these labels for correction.

"Our reply, dated July 12th, stated 'We shall be very glad to comment upon the propriety of labelling for any food for medicinal properties that you may care to submit, provided you submit chemical and quantitative formulas for the products. Our files do not indicate any further communication from Mr. Buckley regarding these articles was received.'

"It will be unnecessary to comment upon the special formula 'Tonine' and the laxative tonic which Mrs. Alberty personally concedes are misbranded.

"Regarding the reason why these products were seized, you are referred to the libels, copies of which no doubt have been furnished you. You express a desire to finally settle this matter in such a way that Mrs. Alberty may feel safe to proceed without being put to more expense in the changing of labels and literature. You also request that no further seizures be had until you have had an

opportunity to either enter into an agreement with the Administration or to determine the matter before the proper department.

"During the past six years, representatives of this Administration have held numerous conferences with Mrs. Alberty, and her representatives, and have engaged in extensive correspondence in an effort to assist her to understand and to conform to the requirements of the law. It has become increasingly evident that Mrs. Alberty has no desire to conform to the spirit of the Food and Drug Act, and to market meritorious products labeled and standing for what they actually are and for what the result they can reasonably expect to produce is.

"On the other hand, the extravagant and altogether fraudulent and deceptive activities which she has continued up to the present, to defy it, leaves no room for doubt that any revised labelling she may make are only such as she feels she is forced to adopt to obviate the penalties of the law.

"The Administration is very glad to give to manufacturers of foods, drug products, who have evidenced a sincere desire to conduct their affairs in an honest manner, the benefit of their advice as to the statute under the law of their merchandise. The law does not require the extension of this courtesy, but it has been the uniform policy of the Administration to afford any such assistance to those who seek it solely for the purpose of—the law does not require this courtesy, but it has been the uniform policy of the Administration to extend it in proper circumstances. On the other hand, we must refuse to afford any such assistance to those who seek it solely for the

(Testimony of Dr. Edward P. Clark)

purpose of devising means of circumventing the special prohibitions of the law while at the same time violating its spirit and defraud the public by employing means which the specific prohibitions of the law do not reach.

"Frankly, therefore, I may say to you it will be useless to submit to this Administration, for comment, any further revisions of labels for the Alberty Food Products."

Thereupon,

Dr. EDWARD P. CLARK

was called and sworn as a witness on behalf of the plaintiff, and testified as follows:

I am a physician and surgeon living in Los Angeles, licensed to practice under the laws of the State of California, and maintain offices in the Beaux Arts Building; I graduated at the Hahnemann in Philadelphia, spent a year in Vienna, practiced in Pittsburgh for ten years and have been here since 1919; I am of the homeopathic school of medicine.

The only difference from the old school is the application of the drugs to the patient; in other words, the homeopaths prescribe for the disease according to the symptoms that the patient has at the time; the remedies are selected according to the symptoms of the patient and not according to the disease; it is usually necessary to make a diagnosis before the giving of any particular drug because, among many other reasons, we know that certain symptoms group themselves under the diseases; in order to make a proper prescription it is necessary to know your disease first because that helps you some in selecting your remedy; then, be-

cause certain remedies are adapted to certain diseases and then the particular remedy out of a whole group is picked out according to the individualistic symtoms of the patient that they suffer at that time; acidosis would require the making of a diagnosis before the prescribing of drugs; acidosis is hardly a disease, it is a deficiency of several elements that the body requires; the same answer would not apply to diarrhea, that is a disease of the intestines; calcium starvation is also a deficiency disease; that usually can be figured out from a blood analysis and then the treatment usually is to supply calcium to the system by mouth, but it is questionable whether that always works unless you always give some parathyroid with it which helps to fix it in the tissue.

There is no such thing in the practice of homeopathy as there being any particular product for an individual disease; I mean this, that, for instance, there isn't any one drug that is good for a simple cold, each patient has different symptoms, each one of those requires an entirely different remedy; the same applies to a cough, the selection of the remedy depends upon the symptoms as well as your diagnosis.

The witness was then read the analysis of Calcatine hereinafter testified to by Government analysts, and he was asked, "What would you say to the practice of advertising such drugs as a remedy for the following conditions: a remedy for the growing organism; a correction for constitutional defects; effective as a treatment or remedy for acidosis, indigestion, calcium starvation, diarrhea, brain irritation, teething in children, effective as a tonic

(Testimony of Dr. Edward P. Clark)

in acute diseases, constitutional weaknesses, emaciation, bone diseases, scrofula and tubercular tendencies?

The question was objected to on the grounds it was incompetent, irrelevant and immaterial and no proper foundation had been laid; the form of the question was objected to as asking the doctor his opinion of the statement just made by counsel, "to the form of the question. That it is a remedy—is that a remedy for that condition or those conditions such as acidosis." The objection was overruled.

Such a preparation containing calcarea-phos wouldn't be indicated in one case in a thousand of those diseases that you mention; the peculiarity of the homeopathic prescriptions is that you have got to investigate every case and taking a remedy of that kind and advertising it as a cure for those diseases produces a great deal of harm, because it gives the patient confidence that this remedy is going to cure him.

Q. What would you say, doctor, as to such a remedy being furnished for the use of the public in general without an individualistic diagnosis from the standpoint of it being harmful or harmless to the patient?

Mr. Kellogg: Your Honor, I object to that as being incompetent, irrelevant and immaterial and not the proper subject for the opinion at this time, as there is no proper foundation that has been laid for an opinion as to what the drug could do to the general public.

The objection was overruled by the Court and an exception noted.

It would be of no benefit to the vast majority of cases or patients. It wouldn't be harmful, in that dosage as a

(Testimony of Dr. Edward P. Clark)

medicine, but its effect upon the patient is harmful; that is what I meant when I said that the patient being given confidence in a remedy that can have no benefit to him is being done harm because they are neglecting to take the proper remedies that might help them; a person that has a case of diabetes, for instance, if on reading the pamphlet or being told that something is good for diabetes, and that remedy is not good for diabetes, then the patient neglects the treatment that we know is good for diabetes and consequently they are likely to go on to convulsions, diabetic coma, and when they are in that condition, 50 per cent, or a larger percentage, die, because of a neglect of a known medicine that is better than anything of this kind.

At the conclusion of the answer the defense moved that the answer be stricken for the purpose of an objection, and the motion was granted. The defense thereupon interposed the following objection; that it was objected to on the ground that it was incompetent, irrelevant, and immaterial, and not within the issues, and no proper foundation had been laid.

The Court: The motion is denied.

Whereupon, an exception was noted.

Upon being read an analysis of the product known as Lebara Pellets, hereinafter testified to by Government analysts, the witness was asked:

Q. What would you say, doctor, as to the use of the product as analyzed in the treatment for malarial disorders, biliousness, diseases of the liver, uric acidity, diathesis, ailments marked by excessive excretions of the bowels, derangement of the liver, gravel and sand in the

uterine, bil*l*iousness, headaches and vomiting of bile, bitter taste, diabetes, trouble arising from living in damp places, malaria and gout, acidosis, *dorman* liver, bile secret*a*ions, clearing the complexion, without an examination being made of the particular cases?

A. I would say the remedy is useless; my reason would be the same as those heretofore given.

Cross Examination

I went to a school, Hahnemann's in Philadelphia, teaching the homeopathic treatment of diseases; I have been engaged in the practice in excess of 30 years; in school I was given instruction in lectures on Shussler's theory; that theory of treatment was first published more than 100 years ago; his theory was that the majority of diseases were produced by the function of certain chemical elements in the system; that was taught for a number of years as a part of the homeopathy school of medicine, but he didn't say one remedy was good for all diseases; he said that certain of these remedies were used at the same time if they were indicated; it is the practice of my school of medicine to use these different remedies that Shussler laid down to check diseases or ailments, when indicated; our school has accepted Shussler's remedies but not the indications for their use; we don't prescribe for the group of diseases, we prescribe for each particular patient as an individual; using thyroid extracts has nothing to do with homeopathy; there are two schools of that school of medicine in the United States, one of them in Philadelphia and one in New York; we are graduated first as physicians and homeopaths secondly.

(Testimony of Dr. Edward P. Clark)

In the analysis read to me on direct examination, I did not find anything that would be injurious or deleterious to human health, a well patient could take each of those articles without any detriment; calcium is used in the treatment of a number of diseases by our school of medicine; calcarea-phos is a combination of calcium and phosphorus; we prescribe it according to the symptoms that the patient has; we have it prepared by the drug manufacturers; I recognized the analysis read me on direct examination as the remedy used by our school under the name of calcarea-phos; a Los Angeles pharmacy run by Hyland specializes in homeopathic remedies; a lot of the remedies mentioned by Shussler have been sold in so-called health stores; in these pharmacies and health stores it has been the custom and practice to have little booklets describing homeopathic treatments, but that doesn't make it right; it still is objectionable to the profession.

I recognized one of the analyses read by counsel for the Government as natrum sulph; our profession uses that as a remedy occasionally; it is another one of Shussler's remedies; I have used that occasionally, about once a year; it is a constitutional remedy, we usually use it for patients who are always worse in wet weather or those who live in damp places, almost what you might call those that have rheumatism or gout or similar ailments; that indicates a deficiency of the substance natrum sulph; I might use it in connection with the excessive secretions of bile; I only use that remedy about once a year; there is nothing in that that would hurt even a well person.

We use calcarea-phos in children who are thin and scrawny and nervous and have trouble in teething and

(Testimony of Dr. Edward P. Clark)

have bone deficiencies; we do not use it where there is a lack of the calcium content in the body necessary to make bone tissue unless they have the symptoms indicating it; I never use it where the condition shows a lack of calcium content; it might be used in our profession that way if they had the symptoms; there is a difference between our school of medicine and the allopaths about the efficiency of taking inert minerals as a medicine; where they say you have to take what is called a shot-gun dose, we believe that the trituration affects the human system better when the symptoms indicate it; the offering of a medicine for sale that has just this trace, by reason of the trituration, would be contrary to our school of medicine because you can't offer a remedy of that kind that is going to help every case; you have got to get the individualism of the patient, and when you put a drug like that on the market with certain labels to cure certain diseases, it is absolutely false and is doing the patient a lot of harm; that is my opinion as a physician; all patent medicines come under that head.

Redirect Examination.

You can't tell without examining whether or not a patient is in such condition that he can absorb calcium; you make a blood test to see whether he is getting it or not; the answers which I have given represent the concensus of the homeopathic medical opinion.

Recross Examination.

There is nothing whatever in calcarea-phos which would be injurious to a man who couldn't assimilate it.

(Testimony of George P. Larrick)

GEORGE P. LARRICK,

recalled as a witness for the plaintiff, testified as follows:

When last on the stand, I did not complete reading the letter I was then reading; there were three paragraphs not finished, which read as follows:

"A copy of the Federal Food and Drug Act is enclosed. Responsibility for conforming to the requirements with this law rests solely upon the manufacture or shipper. This Administration can not relieve the manufacturer of this obligation, nor share in it.

"Any stock of the products under consideration which may be found to be adulterated, or misbranded, will be liable to seizure, prosecution of the shipper may also be expected.

"This Administration has no authority to sanction the continued sale of products it may find upon the market in violation of the Act."

Mrs. Alberty told me she had always tried to obey the law and she had come to the Department for help; she told me that she had started doing that as long ago as 1928; she made the statement that she had been there and the Department would change a label with one word and then let her go out with that and the next thing she knew she had another complaint; I showed her through the record that that was not so; she emphasized that in 1932 she had gone to Dr. Hoover and she had relied on Dr. Hoover to revise her labels for her; Dr. Hoover's place of business is in Washington, D. C., he was formerly a member of the Department; we talked about the labels and talked about the collateral advertising; I told her that

(Testimony of George P. Larrick)

the Federal Trade Commission regulated collateral advertising; I pointed out many statements on her labels which were ambiguous, "what was meant by acidosis", for instance, and when you turned to her book you found that acidosis as she uses it on her labels, covers almost a whole realm of diseases, and that various other things on her labels were interpreted by her as collateral advertising; I objected to it most strenuously; her goods had been seized and she was very much concerned; she made every protestation that she wanted to do what was right; I formed an opinion as to her sincerity; I did not believe that she was in earnest.

Redirect Examination.

When Mrs. Alberty protested that Mr. Campbell's letter was too harsh and was unfair to her, and that her conduct had not been such as to justify our declining to discuss labels with her any more, I took the files of the Administration which contained the interviews and the letters dealing with these conferences and I reviewed them with her and at that time she agreed that these interviews had taken place and that the substance of the interviews, as recorded by the various officials, was correct and that the letters that I displayed had passed between herself and the officials of the Administration; I pointed out that as early as November 22, 1929, at her request, we had taken this little booklet which describes Mrs. Alberty's foods and drugs, and had gone through it with a red pencil and marked the first 14 pages of the book for her so as to give her an idea of the sort of claims that in our judgment at least, should be stricken out; on January 21,

1931, she submitted it with corrections preliminarily made; this particular booklet is entitled "Alberty's Foods for Infant Children and Adults by Adah Alberty, Los Angeles, Calif." I pointed out to her specifically that included in the booklet that had been marked all of the statements concerning the therapeutic value of Calcatine had been indicated to her as false; but, nevertheless, in the revised booklet she had still retained the statements that it was a valuable remedy in anemia, tuberculosis, alcoholic and wasting diseases, swollen glands, ulcers, headaches, too rapid decay of the teeth, pimples, neuralgia, rheumatism, prevents gall stones, acidosis, brain diseases, goitre, pancreatic diseases and so forth; I reviewed, in detail, where those statements had been crossed out previously and pointed out to her that that certainly did not show that she was proceeding to do the things that she now claimed that she was doing; these claims that she still retained in the booklet did not, to my understanding show that she was proceeding in good faith to change her literature so as to make it truthful; as a result of that we wrote to her on January 21, 1931, and said:

"This Administration is in receipt of the booklet 'Alberty's Foods,' and after carefully considering this book we find that it is highly objectionable, containing many of the statements objected to in previous correspondence and interviews."

I pointed out to her that on December 7, 1931, she had an interview with Dr. Spickard of the Food and Drug Administration and that again she had submitted labels for her nerve cells salts and liver cell salts and calcium tablets and here again she had been told they were grossly

(Testimony of George P. Larrick)

false and needed complete revision and that should be done instantly; we discussed the interview with Dr. Cullen on January 25, 1932, when Mrs. Alberty asked for comments again on her labels for nerve cell salts and liver cell salts, and here again she was told the claims were too broad, referring to malaria, bilfiousness and liver disorders; on February 24, 1932, Mrs. Alberty wrote a letter to Dr. Cullen which reads:

"Dear Dr. Cullen:

"I called on Dr. George Hoover. He is surely a wonderful man. I liked him very much. He very kindly made some suggestions as to my labels—Calcatine, Liver Cell and Nerve, which I am surely going to follow and I will send you some of the new ones as soon as I can get home and get them printed.

"Am changing the name of the nerve and liver cell, so will you be kind enough to hold off on any action and give me a chance?

"Of course, there are bottles of this product out, but I will destroy all my remaining labels at my office, as soon as it is possible to get new ones printed.

"Very sincerely, and with all good wishes,

"Adah Alberty."

I pointed out to Mrs. Alberty that this sort of correspondence with Dr. Cullen did not coincide with her assertions to me that Dr. Cullen had approved her labels and was constantly shifting the grounds upon which he

was criticizing her labels." On April 14, 1932, she wrote a letter to Dr. Cullen and said:

"I am enclosing copy of my new labels in question. I hope these will be O. K. I followed some suggestions of Dr. Hoover, so that should help out.

"I will see you again this next winter, as you know I like it around that part of the country."

The labels which were attached to that letter dealt with Alberty's Lebara Organic Pellets, Alberty's Calcatine and one other product which is not involved in this case; The Lebara Organic Pellets contains the claim:

"Aids acidosis, dormant liver, bile secretions, clearing the complexion. Not a laxative."

The Alberty's Calcatine submitted with that letter reads:

"Calcium elements combined in an organic form. Especially useful in calcium deficiency.

"Aids acidosis, teeth, bones, etc. May be taken indefinitely with benefit.";

following the receipt of that letter the Administration wrote her under Dr. Cullen's signature, on April 23, 1932:

"Dear Mrs. Alberty:

"The Administration is in receipt of your letter of April 14 enclosing revised labels for your products 'Alberty's Organic Phosphate Pellets,' 'Alberty's Lebara Organic Pellets,' and 'Alberty's Calcatine.'

"We wish to call your attention to your letter of April 16th.

(Testimony of George P. Larrick)

"Since you have not submitted to the Administration the complete working formulae for your various products, detailed criticism cannot be offered. However, regardless of the composition, statements on these labels referring to the preparations as 'Essential in composition of nervous tissue,' 'Aids acidosis, teeth, bones, etc.' 'Aids acidosis, dormant liver, clearing the complexion,' are considered highly objectionable."

In addition to discussing those phases of her labelling, I undertook to say to Mrs. Alberty, frankly and bluntly, that we did not believe that she was proceeding in good faith to revise her labels and in that connection I read certain portions of her book and she agreed that the book was being distributed throughout health food stores in connection with the sales of her products; I read a typical example of the statements and her attention was called to such of her claims as "gland substances for restoring lost sex power or for overcoming ailments have not in every case proved satisfactory. Beneficial results are very limited, and not always permanent. The Alberty's Food Laboratory's treatment makes use of an established fact—that there is a vital relationship between the sex or endocrine glands and the nervous system." Then I went over the various statements in the various literatures that she had that referred to gallstones, acidosis, Bright's disease, tuberculosis and anemia; Mrs. Alberty was courteously but firmly told that based on our experience with her it is our judgment that a further discussion of her labels was simply a waste of our time as well as hers since it is clearly evident she has been persisting in offering her products under most extravagent claims; she protested and

(Testimony of George P. Larrick)

said she had employed Dr. Hoover to revise her labels and that following the revision of the labels by Dr. Hoover, we had seized them; at the time she made the statement that three of her products, at least, were homeopathic and asked where she could get advice as to the homeopathic labels and I said that if she was going to offer them to the public as a homeopathic medicine she should label it as a homeopathic medicine and that the nearest place to Washington where she could get very authentic information about homeopathic practices in general was the Hahnemann Medical School at Philadelphia, that that was the largest homeopathic medical school in the country; she left my office with the expressed intention of seeing Dr. Hoover and going to the Hahnemann Medical School.

Recross Examination.

A letter from Mrs. Alberty on the letterhead of Thomas Martindale & Co., Philadelphia, Pa., dated September 7, 1934, was received; it is addressed to Mr. W. T. Campbell, Washington, D. C., and read:

"Dear Mr. Campbell:

"I was much disappointed to find you were out of the city when I called to see you. Mr. Larrick kindly granted me an interview.

"Mr. Campbell, I am indeed sorry I have acquired such a terrible reputation in your Department. I could not understand how this could be possible. If you will read letters I have written your Department you will find there is a cooperative spirit. I also made numerous trips to Washington, which at the time, were not really called for,

(Testimony of George P. Larrick)

but I made these trips for the sole purpose of better understanding what the law required. To understand the requirements of the law may be very easy to you, and it also is to a manufacturer, too, at first. We are supposed to tell the truth and live up to certain requirements, but the Government's requirements in fulfilling the law are very far-reaching and what we believe to be the truth, we are told is false and fraudulent. So, after all, it requires an expert to understand the law.

"I find, by much inquiry and questioning that the mistakes I innocently fell into was: I did not delve deep enough into what was meant by the suggestions given me when I called in Washington. I have letters to show that when I made diligent inquiry that the Department was not allowed to offer suggestions how to change labels or literature. When I called at Washington and begged and pleaded for help, Dr. Cullen was kind enough to offer suggestions. I shall always be grateful to him for the help he did give me. He took my booklet and offered suggestions; also wrote in some words and changed some statements for me, then handed me back the booklet. I left his office very happy and though that now my troubles were over. I thought that the rest of my booklet was O. K. He never commented on what I had to say in these booklets about the rest of my products.

"Dr. Kebler told me that Dr. Cullen had meant for me to follow throughout the booklets the suggestions he had given me in the first few pages. But I did not understand it that way. I guess I am dumb all right.

(Testimony of George P. Larrick)

"I shall always feel indebted to Mr. Larrick for the excellent suggestion he made to me—that I get one of the doctors who do know the law to revise or help me with my booklets. He mentioned a few names. I proceeded at once to put his suggestion into action.

"Dr. Hoover was so rushed with work he suggested Dr. Kebler whom, I believe, you are acquainted with. I made definite arrangements with Dr. Kebler to revise my booklets of directions.

"Alton J. Buckley, an attorney here in Philadelphia, is attending to the labels, so I am living in hopes I can get all straightened out in the near future.

"To show my good faith, I am doing some things that you had not asked me to do. I don't want to be accused of anything more. I want to live up to the law, and that is all that the Government can ask of me. I should be accorded the same rights and privileges as any other manufacturer or distributor. I am changing the labels on my foods by adding additional information as to contents. I have never been afraid of the truth at any time. I shall return to Washington soon and shall remain there until Dr. Kebler completes the booklets of directions that goes with my two foods—regular and instant.

"I have ordered all booklets removed from these foods and ordered my office not to ship any food containing booklets until I get the new corrected booklets printed.

"Sincerely,

"Adah Alberty."

(Testimony of George P. Larrick)

On September 13, 1934, I wrote *Mr.* Alberty:

"Mrs. Adah Alberty,
"c/o Thomas Martindale & Co.,
"25 North Tenth Street,
"Philadelphia, Pennsylvania.

"Dear Madam:

"I have your letter of September 7 addressed to Mr. Campbell.

"You express a feeling of gratitude toward myself to which I doubt I am entitled. To avoid any possible future misunderstanding, let me repeat what I tried to make known to you during our conversation.

"First, you indicated that your products are homeopathic preparations, but at the same time asked, because of your expressed lack of knowledge, that we assist you to revise your labels, I referred to the fact that over a period of years we have consistently pointed out claims for your products which were grossly false but that in many instances you have continued to misrepresent the products in the labelling or had simply made the same claims in advertising. It, therefore, would be a waste of time to discuss the labels.

"I also pointed out that in passing upon the claims for preparations claimed to be homeopathic it was our practice to consult homeopathic physicians. You indicated your purpose to see some of the physicians at the Hahnemann Medical College at Philadelphia, and I agreed that this would be a wise course to pursue if you were not familiar with the concensus of homeopathic medical opinion. I fur-

(Testimony of George P. Larrick)

ther advised you, after ascertaining such expert medical opinion, that it would be wise to present these facts to someone professionally qualified to advise concerning the legal requirements of the Federal Food and Drugs Act, since you asserted your lack of familiarity with the requirements of the Act as interpreted by the courts.

"I declined to recommend someone for you to consult since it is an established policy of the Department to make no such recommendation.

"I am sure you will appreciate the importance of an understanding of our Administration's policy in these matters. This is the reason for my reply.

"Very truly yours,

"G. P. Larrick, Acting Chief."

I received a letter from her dated September 17, 1934, which read:

"Washington, D. C.
"September 17, 1934.

"Mr. George P. Larrick,
"Federal Food and Drug,
"Washington, D. C.

"Dear Mr. Larrick:

"Thanks for yours of September 13th.

"I have just returned from Philadelphia where I had the privilege of some interviews with authorities on the treatment of ailments by homeopathy:

"Dr. W. W. Young, Hahnemann's Medical College, who is an outstanding authority and first assistant to Dr.

(Testimony of George P. Larrick)

Boericke, also Dr. Plummer, Medical Advisor of Hahnemann's Hospital, formerly of United States Navy.

"Both of these physicians agreed that the concensus of homeopathic medical opinion was a combination of various tissue remedies given together in one dose. Dr. Plummer agreed that there had been a departure from the old system.

"Ailments today are complicated. Take a patient who is neither sick nor well, but has anemia, a general run-down condition, nervousness, acid stomach, dormant liver and tooth decay. There is no single homeopathic remedy that can possibly bring even relief.

"Dr. Plummer said, 'We are following after the practice of some of the allopaths and giving "shotgun" doses.' He took me to the laboratory and introduced me to their chemist. I was shown bottles and bottles of tablets in combination and was told that four and five of these combinations were given at a single dose, and when they were puzzled to determine just what was wrong, they gave the patient the whole works.

"Dr. Young said his father never gave less than ten remedies at one time. That it was only in rare instances (unless an old homeopath) that one remedy was given at a time and that was when it was a 'specific'. When a baby was suffering from ricketts, Calc. Phos would be the only remedy.

"I explained to Dr. Young that the Federal Food and Drug claimed my statements for my homeopathic remedies were 'grossly false'. He suggested I get one of the college textbooks and make the same claims as given in it. I told him that was what I had done. He said my claims

(Testimony of George P. Larrick)

were in keeping with the recognized textbooks. I asked him if the Government recognized the claims they made for their various remedies and he said, 'Yes, of course, that the Government licensed their colleges.'

"Now Mr. Larrick, I am copying below the name of my products and the homeopathic name and the ailments indicated for taken from homeopathic textbooks.

"My Calcatine is homeopathic calcarea phosphorica, a remedy in general for the proper growth and nutrition of the body. A tissue restorer. Anemia. Dysmenorrhea—difficult and painful menstruation, dyspepsia, kidney infections, leucorrhea, phthisis, incipient consumption and head sweats. Rheumatism, tooth decay, ricketts, bone diseases and ailments of old age, etc.

"My Lebara Pellets is natrum sulph or sodium sulphate. The textbook says—'Natrum sulph is a bil*l*ious remedy, bil*l*ious vomiting, or errutations or diarrhea. Sick headache. Bitter taste. Brown tongue. Asthma, Bronchitis, catarrh, gastric biliousness, excess bile, heartburn. Jaundice, also inflamed or irritated liver conditions.

"My Phosphate Pellets—homeopathic—are composed of calcarea-phos, ferrum (Iron), phos-kali-phos (potassium), —magnesium phos natrum (sodium), phos. Calcarea-phos —explained under Calcatine—ferrum phos—for all inflammations. The books go into detail on all kinds of inflammations of various organ*i*s of the body. (Kali (potassium) phos—is a remedy for brain, nerve and blood.

(Testimony of George P. Larrick)

Mental breakdown and nervous pr*ot*ration. Neurasthenia asthma, hay fever, delirium tremens, epilepsy, paralysis, sciatica, greasy skin, sleeplessness, etc. Magnesium phos —arthritis, neuralgia, and a lot of other ailments.

"Both Drs. Young and Plummer said the combinations I was recommending were excellent and could do no harm, as these minerals had an affinity for each other. Dr. Young said he would be glad to help me out in any way possible.

"Please let me call your attention to the fact that in all homeopathic pharmacies, they supply booklets describing ailments with the suggested remedy. Everyone is supposed to diagnose their own ailments and use the remedies suggested. If you will call at 1007 H Street, N. W., Washington, you can obtain a descriptive booklet on compound tablets and on page 1 is a quotation from Dr. Ed M. Hale, an eminent homeopathic physician telling of his success in using combination homeopathic remedies.

"I am sorry to bore you with all this, but I really do want to arrive at some understanding with your Department and am doing my best and Dr. Kebler is helping me.

"Thanking you for your kind attention in regards to this matter, I am."

I made a trip to Philadelphia and after consulting homeopathic physicians to whom she had referred in her letter to me, I wrote her this letter:

(Testimony of George P. Larrick)

"Mrs. Adah Alberty,
"The Alberty Food Products,
"729 Seward Avenue,
"Hollywood, California.

"Dear Madam:

"Reference is made to your letter of September 17, 1934, relative to the following preparations:

"Calcatine.
"Lebara Pellets.
"Phosphate Pelletts.

"The Department has consulted leading authorities on homeopathy and has been advised that the claims you propose to make for your preparations are contrary to the concensus of homepathic opinion and therefore would constitute misbranding as defined in the Federal Food and Drugs Act.

"Your attorney, Mr. Buckley, has submitted labellings for a number of your products which were seized in Philadelphia. We have commented upon these labels through our Philadelphia station, who, in turn, will communicate with your attorney. We assume you will be advised of those comments through him."

(The correspondence referred to and read from by the witness was offered by the plaintiff and received in evidence without objection and marked Government's Exhibit No. 12.)

(Testimony of Dr. George W. Hoover)

Thereupon,

DR. GEORGE W. HOOVER,

was called and sworn as a witness on behalf of the plaintiff and testified as follows:

I live at Washington, D. C.; I am a consulting chemist; was formerly connected with the Federal Food and Drug Department, and was appointed as a civil service employee in the Bureau of Chemistry in February 1904. I served continuously with that organization, which later became the Food and Drug Administration, until May 1928; I then left the service and went into private practice; my work consisted of dealing with formulaes, devising and changing them, and endeavoring to make labels and literature comply with the requirements of the Federal Food and Drug Act. I had two conferences with Mrs. Alberty; the first conference was four or five years ago, probably in February, 1932; Mrs. Alberty called at my office and stated that she had been in contact with the officials of the Federal Food and Drug Administration who took exception and had made objection to certain statements on her labels and in the literature which she had prepared; someone had given her my name, and she asked if I would look over this material and give her my opinion of it; I consented to do this; I looked over the labels and the booklet, or pamphlet; after reviewing this material, I expressed the opinion that there were many statements with respect to therapeutic effect of her products which were in violation of the Federal Food and Drug Act or would be regarded in that light as a violation of the law by the officials; I furthermore advised her that it was my belief

(Testimony of Dr. George W. Hoover)

that if she continued to do business under this label, and the Government officials had occasion to investigate her products, drastic action would probably be taken, that is, that the goods would probably be seized and thereby followed by a criminal prosecution; I counselled her to take steps to correct this labeling; Mrs. Alberty thanked me and she may have offered to compensate me; I did not feel that the services that I had rendered her warranted me in making any charge and no fee was accepted. I pointed out to her certain things as examples that I believed were in great need of attention; I made no revision of any label; I believe that I pointed out a reference to diabetes and to malaria and to scrofulous or tubercular conditions; these diseases I regarded as very serious, and in some instances are not amenable to any medicinal treatments that I know of at the present time; other diseases, like malaria, must have a specific treatment of quinine or some of the other alkaloids cinchona bark; diabetes must have a treatment of insulin or some preparation of insulin in order to be effective; and it was owing to the seriousness of these diseases that I emphasized to Mrs. Alberty at that time the desirability of making drastic and radical changes in her literature; I at no time approved her labelling.

Mrs. Alberty again called at my office in September, 1934; she stated to me that the Government had taken action against some of her products and asked if an arrangement could be made with me to revise her labelling and assist her with the problem she had on hand as a result of that action; I advised Mrs. Alberty that it would be some weeks before I could give the attention to her

(Testimony of Dr. George W. Hoover)

products and problems that the problems demanded; I suggested to her that if she cared to have me do so I believed I could put her in contact with a man I thought was entirely competent to assist her, and she asked me to do so; accordingly, I called Dr. L. F. Kebler in Washington, D. C., and made an appointment for him to have a conference with her.

Cross Examination.

I graduated from the Oklahoma Agricultural College in a course of chemistry in 1904; later I took post-graduate work in chemistry in George Washington University, studied and graduated in medicine and was licensed to practice in the District of Columbia, but I have never practiced medicine. I know most of the medical personnel of the Food and Drug Administration as it has been constituted for the last six or seven years; I believe they are all allopaths, I cannot name one homeopath in the Department; I do not have a preconceived idea of my own about the effectiveness of homeopathic remedies as administered; it was the policy of the Department while I was with it, if the defendant had a homeopathic preparation to consider, to consult homeopathic physicians in order to get the opinion of the homeopathic physicians with respect to the preparation or preparations we had under consideration; I recall a considerable number of off-hand suggestions made to Mrs. Alberty when she came to me in 1932; I would call attention to the name of the disease, or the names of diseases on the label that I believed that regardless of the composition of the product, or regardless of whether or not it was an allopathic or a homeopathic preparation, the Government would take action against

(Testimony of Dr. George W. Hoover)

that product; this was based upon the experience that I had had with the Government service in an endeavor to enforce this law; I had in mind Bureau regulations and policies as I knew them; Mrs. Alberty showed me either a pamphlet or a booklet; in all probability she said it was not sold with the packages; I don't recall having discussed the booklet; I consistently advised everybody that I worked for to revise collateral advertising in order to bring it into conformity; it was my understanding that under certain conditions collateral advertising might be made subject to the provisions of the Federal Food and Drug Act; I recall a case in Milwaukee on water that was in the Federal courts before Judge Geiger perhaps 15 or 20 years ago, based on a revised label; the Government sought to introduce a previous label that had been used in order to give the jury an opportunity to interpret the present label and the Court permitted the previous label to be admitted for consideration by the jury; after that the legal office of the Department of Agriculture, I believe, held that collateral advertising was not subject to the provisions of the Federal Food and Drug Act. I had looked at the label of some calcium product which was discussed at length with Mrs. Alberty at our first interview. I do not recall any particular wording for a revision of it, but I did suggest removing from the label certain words and statements.

The witness was then shown three labels of "Alberty's Calcatine", defense Exhibits A-1, A-2 and A-3, also defense Exhibit A-4 (Alberty's Nerve and Food Pellets) and defense Exhibit A-5 (Alberty's Organic Phosphate Pellets).

(Testimony of Dr. George W. Hoover)

The witness then went on to state:– I might have advised her regarding her label (referring to Exhibits A-1 and A-4), but it does not conform to the advice I gave Mrs. Alberty. The word "Acidosis", I never approved on any label I ever had anything to do with, and I have revised literally thousands of them. I never would approve of the words "dormant liver" on any of these labels. Owing to the seriousness of the diseases which may affect the liver, I would never approve those words. I base my statements upon custom and practice absolutely, and not upon individual recollection.

The labels marked defendant's Exhibits B-1 and B-2 were then offered for identification. Dr. Hoover then went on to testify as follows:

Mrs. Alberty told me she had various contacts with the Department of the Food and Drug Administration, and the officials had made objections to her labels. She said she came to me for advice as to what I thought should be done. Afterwards, in 1934, when she came to me she told me the government had started seizing her products and asked if I would advise her as to the labels, recalling the fact that she had been to see me in 1932. She had had advice I had given her in general cases as example of the changing, which I thought should be made. I feel quite certain I glanced at the booklet "The Hour Glass", or made a cursory examination, at least, of a part of it. I don't recall making any examination specifically.

At this point, government counsel made the following offer:

MR. PURDUE: Your Honor, the book "The Hour Glass," by Mrs. Adah Alberty, marked Government's Exhibit No. 11—I do not believe that there was a formal

(Testimony of Dr. George W. Hoover)

renewal of its offer in evidence and I would like to make that offer at this time.

THE COURT: Very well.

MR. KELLOGG: I thought there was, if your Honor please. If it is to be renewed, may I again object?

THE COURT: What?

MR. KELLOGG: May I renew my objection to the introduction in evidence on the ground that it is incompetent, irrelevant and immaterial, not within the issues of the charges here, not proper evidence of a violation of the acts charged.

THE COURT: Overruled.

THE CLERK: No. 11.

MR. KELLOGG: May I note an exception, and I further object on the ground that no proper foundation has been laid.

MR. PURDUE: For the purpose of illustration, I wish to read two or three brief excerpts. They will be limited, so as to expedite the time.

MR. KELLOGG: If your Honor please, I suggest that manifestly it is unfair—I realize that a book of this dimension is hardly to be read to the jury in its entirety, but, to read excerpts from that book would be hardly fair.

MR. PURDUE: Of course, the book is in evidence, and counsel may read any part he choses and the jury, at a later time, with the permission of the Court, can take it to the jury room for examination of the whole.

THE COURT: I have always thought it was a fair enough practice, when a document was introduced in evidence, for either party to read such portions thereof as he sees fit. I recognize what you say, that its size may

(Testimony of Dr. George W. Hoover)

be difficult, but I will, under the circumstances, however, permit counsel to call attention to the jury of such parts of the book as he sees fit and the jury is cautioned, of course, to remember that it is only a small part of the book. At least, I hope he is not going to read the whole book at this time.

MR. PURDUE: No, your Honor.

THE COURT: AND, of course, counsel on the other side will read such portions—will have the right at all times to read such portions as he sees fit.

Mr. Purdue then read from Exhibit 11 as follows:

"How the human race became calcium-starved.

"Naturally you will ask, 'How did I become calcium-starved?'

"Calcium starvation may be brought about in a number of ways. To begin with, the majority of babies are now born calcium-starved and the deficiency has never been made up. Statistics shows that 91 per cent of all the babies born are calcium-starved."—

MR. PURDUE (Continuing to read): "A few generations ago, it was only the premature infant that was born deficient in calcium.

"The foetus is a 'calcium parasite' because it requires a large amount of this element, and, in order to obtain it, it draws upon the maternal tissues in a way that often seriously impoverishes the mother, and even at that, fails to get all it needs and consequently it is born calcium-starved."

(Testimony of Dr. George W. Hoover)

Mr. Purdue continued to read Exhibit 11, commencing on page 170 of the book, as follows:

"The Curse of the World—Acidosis.

"Acidosis spells disease, old age and death. It is the grim reaper's most effective weapon. Premature old age and ill health are brought about by acidosis, which changes the chemical elements or hormones of the internal secretions of the glands that govern the processes of metabolism. These glands are the parathyroids, thyroid, testicles, ovaries, adrenals and the pituitary body."

He then skipped to page 231 of Exhibit 11, and read:

"Syphilis - Inherited - Babies.

"When a baby is born with inherited syphilis it can be eradicated in a short time, if taken in the early months of life.

"The mother's milk is rarely indicated in such cases, even though she herself may have escaped, as her blood more or less is affected.

"These babies should be placed on Alberty's Food as soon as possible, as results will be more pronounced when metabolism is at the maximum, than when the child gets older.

"Alberty's Calcatine should invariably be used in conjunction with Alberty's Food. No orange or prune juice should be given."

He then skipped to page 259 of Exhibit 11, and read:

"Calcatine.

"Calcium is essential to health and long life.

"Alberty's Calcatine helps to offset acidosis and 'speeds up' cell reproduction by supplying a base for the new

(Testimony of Elgar O. Eaton)

cells. While Alberty's Food supplies the body with its daily need of calcium, the more calcium supplied, the sooner one will recover health. The entire body feels its revitalizing effects. Calcatine is especially beneficial and a valuable remedy in anemia, tuberculosis, all chronic or wasting diseases, swollen glands, ulcers, headaches, too rapid decay of the teeth, pumples, neuralgic rheumatism, prevents gallstones, acidosis, Bright's disease, goitre, pacreatic diseases, etc. Calcatine is not a medicine but a valuable tissue and cell salts. $1.00 per bottle, six bottles for $5.00."

The next witness called on behalf of the government was

ELGAR O. EATON,

who testified substantially as follows:

I am senior druggist and analyst for the Western Division of the Food and Drug Administration Department of Agriculture. I made analyses of the following samples designated by number and followed by the analysis.

(a) No. 37350-A. Analysis shows a small white uncoated tablet consisting almost entirely of milk of sugar, weighting a little more than one grain, containing about 14/100 of 1% of ash. The ash is essentially calcium phosphate, including faint traces of sodium and potassium, magnesium and calcium phosphate, which are impurities in sugar of milk. The label was "Alberty's Calcatine".

(b) No. 38255-A. This shows a dry vegetable mixture in capsule. It was not concentrated nor an extract. It is alcoholic soluble 23 per cent (by weight). Protein 21.6 per cent (by weight). Ash 13.7 per cent (by weight). Acid soluble .5 per cent (by weight). Reducing sugars

9.8 per cent by weight. The loss of water is at 105 degrees Centigrade (including volatile oils). The mixture is 2.8 per cent by weight. Microscopically it consisted entirely of plant tissue. I concluded the preparation contained celery, possible meat substances, and other vegetable substances. The label was designated "Alberty's Anti-Diabetic Vegetable Compound".

CROSS-EXAMINATION:

I found nothing injurious to anybody's health in the latter substance. It was a vegetable substance in dehydrated form containing no alkaloids and nothing of a medication type. It may possibly have a little food value. It was concentrated by loss of moisture only, but not by extraction.

ERNEST H. GRANT

was the next witness called on behalf of the government, and he testified in substance as follows:

After graduating from Ohio State University in 1910, I accepted a position with the United States Bureau of Chemistry, now known as the Food and Drug Administration, in July, 1910. After leaving the service in 1919, I returned in 1927 and ever since have been with the government. I made analyses designated as follows:

(a) No. 34867-A. Made in Baltimore, Maryland, April 7, 1933. The sample consisted of two original bottles containing 250 tables each, average weight .0873 grams or 1.208 grains per tablet. They were small white tablets of sugar of milk with ash .034 per cent; inorganic salts consisting principally of calcium phosphate, iron,

(Testimony of Ernest H. Grant)

magnesium, sodium and potassium and a trace of chlorides. The product was labelled "Alberty's Calcatine".

(b) No. 34868-A. Two bottles of 250 tablets each, average weight .0733 grams or 1.131 grains per tablet, consisting of white tablets of sugar of milk, small amount of inorganic salts. The ash was .026 per cent consisting principally of calcium phosphate, traces of iron, magnesium, sodium and potassium and chlorides. It was labelled "Alberty's Liver Cell Salts."

(c) No. 34869-A. The label was "Calcatine". The product was just the same as my first analysis.

(d) No. 34870. My analysis showed the same results as the other except there was a bit more ash than than in the two first ones.

(e) No. 34871-A. The analysis was the same as the previous ones except the ash was .038 per cent, containing about the same substances. All the analyses were made on the date I mentioned.

CROSS-EXAMINATION:

I am Associate Chemist with the government, have been for five years. It is practically my sole duty to examine and approve different so-called medicines and remedies which come to the attention of the Department. I do not recall ever running into this formula before. I am not a doctor and never studied medicine. I have had occasion to investigate homeopathic remedies when brought to my attention for analysis. I don't recall analyzing calcarea phos or natrum sulph so labeled. I know what the homeopathic school of medicine is. I have examined other medicines of a homeopathic character, but it has been my experience they were milk of sugar with a trace

(Testimony of George L. Keenan)

of other chemicals. I have analyzed other homeopathic remedies before I ever heard of Mrs. Alberty and they were usually pellets containing sugar of milk with ash, and these were not different in any respect, to my recollection, from other homeopathic remedies. The samples I have mentioned came to me as head of the drug laboratory for analysis. The samples were shipped by the inspector to the Baltimore laboratory as we handle all eastern seaboard drug samples except those originating around New York City. I have studied food chemistry or organic chemistry as part of my education from 1906 to 1910 while I was in college. There was nothing in these bottles that contained matter I would consider harmful to cell tissues. There was nothing deleterious in them.

GEORGE L. KEENAN

was called as a witness on behalf of the government, and testified upon

Direct Examination

substantially as follows:

I am an analyst in the Food and Drug Administration of the government, and have made the following analyses:

(a) No. 38255-A. The analysis showed the material in the capsule consisted largely of powdered leaf, root, and possibly some seed and seed tissues. It was labelled "Alberty's Anti-Diabetic Vegetable Compound Capsules". I made the analysis May 19, 1933, in Washington, D. C.

(b) No. 38256-A. The analysis was the same as No. 38255-A. It was labelled the same.

(c) No. 41209-A. The analysis was the same as the two previous. The label was the same.

(Testimony of Dr. Clinton H. Thienes)

CROSS-EXAMINATION:

I determined the capsules were a dry vegetable matter from their odor and flavor. I found nothing in them that I would consider harmful to humans.

DR. CLINTON H. THIENES

was called as a witness on behalf of the government, and on

Direct Examination

testified substantially as follows:

I am a physician and professor of pharmacology at the University of Southern California; pharmacology is a science having to do with the chemistry, the actions, both useful and poisonous actions, and the therapeutic use of drugs; I have been with the University since 1929; before that I had a similar position at the University of Oregon where I graduated with honors in chemistry and a degree of Bachelor of Arts. I obtained the degree of Doctor of Medicine at the University of Oregon, and during that period conducted investigations or research for which I received the degree of Master of Arts. In 1925 I spent a year as a fellow of natural research at the Stanford University Medical School and got additional training in pharmacology. While teaching in the University of Oregon I conducted clinics in the medical school dispensaries as well as teaching in the classes in pharmacology and also doing research in pharmacology. I have been practicing since coming to the University of Southern California in 1929. I am the author of fifty scientific articles discussing my research.

(Testimony of Dr. Clinton H. Thienes)

The witness was then questioned about what was meant by acidosis, and stated: Acidosis is a very broad term. It is difficult to define, but in a general way, it means a decrease in the amount of alkaloids in the blood and tissues and is often accompanied by what we call "keytosis", a presence of an excess amount of acetone bodies in the blood, urine and tissues. It would take several hours to explain the thing thoroughly. Acidosis may result from a number of causes such as starvation, diseases of malnutrition, taking of acids, excessive exercise, infection and a number of other things. Various types of poisons could produce acidosis. It can be a very serious condition and may lead to death if it continues. It is separate and distinct from the term acidity which refers simply to an acid state of things, whereas acidosis usually refers to a pathological state. If the blood or body tissues were acid, life would be impossible.

Hereupon the analysis of one of the government exhibits of Calcatine was read to the witness and he was asked whether or not such a preparation would be of any benefit for the use in the treatment of acidosis, assuming the dosage to be three pellets every two hours for the first thirty days and three pellets before meals dissolved on the tongue. The witness stated: The lactose, or milk sugar, if taken in many times this dosage, in the presence of a carbohydrate starvation, since lactose or milk sugar is one of the carbohydrates which the human body utilizes might, and if the acidosis were due to carbohydrate starvation—that is, if a person were getting nothing but meat, or starches, acidosis of that origin might be overcome temporarily, or at least by taking large amounts of milk sugar, but in this dosage it would be about half a tea-

(Testimony of Dr. Clinton H. Thienes)

spoon full, if my calculation is correct, would certainly have no effect upon acidosis of this type, and upon other types it would probably have very little effect. There might be some particular times where large enough amounts would have an effect, but in this small dosage it could not have any appreciable influence on any of the types of acidosis. The amount of calcium phosphate is infinitesimal. In a quart of milk, which contains approximately one gram of calcium, one tablet would contain perhaps as much calcium as a few drops of milk. It would amount to putting three or four drops of milk in a bottle as far as the calcium is concerned. Milk contains a considerable quantity of sodium, magnesium, iron and traces of iron, certainly more than in one of these tablets. The other elements listed are all found in milk and there is milk sugar in milk, so a tablet would be like adding a few more drops of milk in the bottle. It would not have any influence upon conditions of acidosis in an infant.

Some of the causes of indigestion are ulcers of the stomach, cancer of the stomach, ulcers of the intestines, cancer of the intestines, types of tumors, or infections in the intestinal tract; diseases of the pancreas, diseases of the liver; overeating, simple constipation. These are some of the things which produce what the layman calls "indigestion". As the medical man understands it, the term is an insignificant term—a failure to digest food. I am using the term "indigestion" in the lay sense rather than in the strictly medical sense, in answering your question. I would say, No, Calcatine would be of no benefit for indigestion. It would have no influence upon any of the things that cause symptom complaints—abdominal discomfort, heartburn, and so on, that a layman calls "indiges-

tion". The amount of calcium in these tablets is so infinitesmal it would have no influence on calcium starvation. The calcium requirement of the body is between one-half and one gram daily. A gram is about one-thirtieth of an ounce. A quart of milk contains approximately the body's requirement per day. It would be analagous to giving a very few drops of milk per day to supply the body's needs when the requirement is practically a quart of milk, if one gets all his calcium just from milk. Of course, calcium comes from vegetables, fruit and other types of food.

Diarrhea is caused by any one of a long list of conditions. From the causes of diarrhea that come to my mind just now, the tablets would have no influence upon them. A few of the causes are over-eating, or eating a type of food to which one is sensitive, infection in the bowel, the presence of certain types of ulcers, food indiscretions; even cancer may cause diarrhea; Amebic dysentary is one of the forms of diarrhea, and so on.

Neither the milk sugar nor the traces of calcium phosphate nor the traces of the other elements would have any influence upon the things I mention.

My answer would be the same if the ash present showed .026 per cent instead of .134 per cent, or .062 per cent instead of .052 per cent.

As to irritation of the brain, I would say it may result from scar tissue constantly pulling on brain tissue, or from a spicule of bone poking into the brain from an injury, from infection, or certain types of poison. Tumors may produce an irritation phenomena, and so on, and in none of the conditions I have mentioned could these tablets be of any use whatsoever.

(Testimony of Dr. Clinton H. Thienes)

Teething in children is a perfectly natural process. These tablets would have no influence on it. I don't see that it needs any remedy.

There is nothing in the preparation that would act as a tonic, in the lay sense. In medicine the term "tonic" may have a little different meaning, but even here it would have no tonic action.

Well, there are many constitutional weaknesses. That again is, of course, a very loose and purely definable term, but I can think of nothing I can put in that class which would be influenced in any way by the preparation in the dosages indicated.

Neither would they have an influence in emaciation. Emaciation, of course, may be due to things like cancer, or gastric ulcers preventing one from taking proper food. It may be due to diabetes and it may be due to infections such as tuberculosis or certain acute infections. Emaciation, of course, is a very serious condition, and any of the types of emaciation, which are very serious conditions, none of them that I can think of—I would say that none of them would be influenced by these preparations or by any of the pellets described.

My answer would be the same in the treatment of bone diseases. There are many bone diseases—bone cancers, ricketts, disease due to tumors of the parathyroid gland, those due to disease of the thyroid gland, and those due to infection. The bone disease which is most familiar probably is ordinary osteomyolitis, and there is tuberculosis of the bone, and all various very serious conditions often leading to death, and in none of these mentioned by me or any others I can think of would the disease be influenced by the pellets in the dosages indicated.

(Testimony of Dr. Clinton H. Thienes)

Scrofula is an old fashioned term usually applied to tubercular diseases of the lymphatic glands in the neck, frequently seen in children in the old days before milk pas*tu*rization. Among the poor, ignorant and careless, we still see it. Any tubercular infection is a very serious thing. It would not be influenced in any way by these tablets. (The foregoing was in answer to the question "Well, what about scrofulous tendencies?") Tubercular tendencies is a name that really has not any particular meaning, but if by that is meant a condition of any—of any tubercular condition of the body, I would say that the tablets had no value at all, would be of no value at all, and the preparation would have no influence on any of the various ailments of the teeth, which would run from syphilitic lesions to simple decay.

At this point the witness was referred to Liver Cell Salts (Count 2). The analysis was read to him and he was asked if such a preparation would be effective in dosages of three pellets every two hours for thirty days and then three pellets before each meal and on going to bed, dissolved on the tongue, as a treatment for malarial disorders. The witness then went on and answered as follows:

I presume that means simply malaria, which, of course, is a disease due to one of a number of little one-celled animals which we call the malaria parasite. There are several species that produce certain variations in the system depending upon the different species of parasite. The preparation described would have no influence upon the ravages of that parasite upon the human body. Malaria is a very serious condition. It ranks rather

(Testimony of Dr. Clinton H. Thienes)

highly among the causes of death in a number of districts in this country.

Biliousness is a term that may have no meaning scientifically. The layman thinks of biliousness as a condition of burning stomach and esophogus, and often vomiting. Vomiting of bile, perhaps with a diarrhea associated with it and a headache. Such conditions may be due to a large number of conditions, some of which may be very serious, such as cancer of the stomach, ulcer of the stomach, ulcer of the bowels, acute liver diseases of infectuos type, and so on. My answer would be again this preparation would have no influence upon any of the conditions causing this group of symptoms or anything else called biliousness by laymen. There are infections of various types including amebic dysentary which get in the liver and produce abcesses. There are various types of conditions which we call "cirrhosis", which we might call a fibrous of the liver developing from scars in the liver where liver cells have been injured and have been degenerating. There may be cancer of the liver, various temporary alterations in the liver functions due to poisons, some of which produce permanent damage to the liver, such as arsenical poisoning, phosphorous poisoning, and so on. There are a number of conditions which may or are apt to cause death if left untreated. Some are curcable if treated promptly. If this treatment as described would have no influence upon the diseases' process—the material is practically inert, the small amount of milk sugar negligible as a food, the traces of salt negligible to replace the body requirements for those salts—in those diseases where progress is from bad to worse unless proper treatment is instituted (many of them going on to death without proper

treatment), in some cases the use of these preparations as described instead of securing proper medical care would simply be suicide, and if death would not result in some of these diseases, various morbidities, serious damages which are irreparable and can not be brought back to normal function even though they may not kill, and at the same time, the patient would be a cripple, one sort or another, depending upon the disease. For example, we might say a tuberculosis of the hip joint. Some children may have tuberculosis of the hip joint and get well without medical care—get well as far as the acute infection of the hip joint is concerned—but that hip joint will be made stiff, the leg will be drawn out of shape and the child would be a cripple for life, or at any time during his life the old infection may start up again and kill him.

The term "uric acid diathesis" doesn't mean anything to me. That is a lay term and has no medical significance. As far as I can find out, no layman knows what it means, either. It is just a term found among advertising of proprietory medicines to scare people into taking the particular proprietory medicine.

Upon motion of Mr. Kellogg the last part of the answer was stricken.

The witness then went on to say, in answer to additional questions by government counsel:—

Uric acid is an organic substance found in the urine whose exact origin is not well understood, except that we know it comes from tissues. If we take any cell of the body and treat it chemically so as to break it down to various concentrates, we will ultimately get one of concentrated urine. Uric acid is thought of as wear and tear of tissues and the breakdown of tissues in their use

(Testimony of Dr. Clinton H. Thienes)

by the body ultimately finding their way into the urine. Uric acid is a normal concentrate of urine. For instance, gout is a condition in which there is a collection of uric acid salts in the joints and other parts of the body, and the production of uric acid during the acute stages may be high and the excretion of uric acid therefore high. This is the only condition in which uric acid is definitely significant as having any relationship to the disease. These pellets would have no influence upon gout.

I have never heard of a proven case of excess secretion of bile by the liver and I do not think there is such a condition. The answer I have already given concerning diseases of the liver covers the term "derangements of the liver".

"Uterine" is an adjective. There are conditions in which stones of various types may be found in the kidney itself or along the urinary passage from the kidney down. Kidney stones are a serious condition in which they may cause a damming up of the urinary secretion with a stricture of the kidney, and ultimately death. The stone in the kidney may, in many cases, be removed by surgical operation. The stone in the uretor may cause very severe pain, often, and of course, if it is very fine sand, often no pain except in the passage of urine, when, at times, it acts as simply a mechnical irritant. Large stones in the bladder are often serious. Any type of stone in the bladder usually leads to infection of the bladder, if allowed to remain there, and neither large nor small stones, nor the minute ones we speak of as "sand", really a lay term rather than a medical one) would be influenced by this preparation in the dosages indicated whatsoever.

(Testimony of Dr. Clinton H. Thienes)

As to the Liver Cell Salts, my answer would be identical. It would be of no value whatever for treating biliousness or headaches, with vomiting of bile. That, of course, is another of those lay ideas. It may be due to many things, but not any of them I can think of would cause it to be influenced by this preparation.

The witness was then asked, would the preparation be of any benefit for bitter taste. He continued his testimony as follows:—

Bitter taste—I presume one may have a bitter taste in the presence of jaundice. Of course, taking any bitter substance into the mouth would cause it. The bile salts are bitter, and when they occur in the blood in a high concentration they affect the taste buds of the tongue and produce a bitter taste. There is a drug which will so paralyze the bitter taste endings, the taste organs on the tongue which have to do with bitter taste, that a bitter taste would not be noticed. Such a drug is the only substance which would influence, without harming, the bitter endings of the nerves., the little organs in the tongue which have to do with the bitter taste. Of course, if the bitter taste of the tongue were due to jaundice—that is, a condition occurring in many very serious diseases, only harm—from lack of proper treatment—could result from taking the cell salts. They would not be of any benefit in the treatment of diabetes, nor of any benefit whatsoever in the treatment of trouble arising from living in damp places. There are so many things that might be meant by that, such as living around swamps where malarial mosquitoes occur, it might be malaria. Some people think they get rh*eum*atism from being in damp quarters,

(Testimony of Dr. Clinton H. Thienes)

and so on. Really, I don't think the term has any significance.

The witness was asked if the preparation would be of any aid in clearing the complexion. He then went on *said* said: There is no good definition for a clear complexion: I do not see how this material could influence the complexion in any way.

Mr. Purdue then referred to "Alberty's Anti-Diabetic Vegetable Compound", and read the analysis contained in the counts No. 8, 9 and 10, and asked the doctor if such a preparation, containing microscopic plant tissue, celery and beet substances being present among others would be of any benefit as a treatment for disabetes.

The witness then went on to state as follows:

It would have no more value, assuming it to be a dried vegetable matter, than any dried vegetable in similar amount given to a diabetic as part of his food. The treatment of a diabetic consists in prescribing by a physician and taking by the patient of a very definite amount of different types of food. We prescribe so much protein-containing foods, so much of the fat-containing foods, and so much of the carbohydrate-containing foods, making an effort to get all the necessary vitamines and salts that are required by the body. Diabetes requires a very carefully controlled amount of different types of food because diabetes is a disease in which there is a disorder of the ability of the body to utilize fats, carbohydrates, and proteins, especially carbohydrates, but the others, either directly or indirectly, through the effect metabolism on starches and sugars.

(Testimony of Dr. Clinton H. Thienes)

The amount of food a diabetic can take is restricted. Since one of the ways to hold off hunger pains is to have the stomach full of something, we usually have the patient take those vegetables having very little food value to fill his stomach after he has eaten his allowance of bread, potatoes, meat and milk. By little food value, I mean in the sense of carbohydrates, fats and proteins, like lettuce, celery, cabbage and carrots. They are foods having a relatively low carbohydrate content and a very low fat and protein content. Even today, when we know and use insulin when indicated, a physician almost invariably prescribes liberal amounts of those vegetables having little energy producing value containing the necessary salts for the body. Ordinarily, in diabetes, we do not have to restrict salts. Vegetables, when taken in the fresh state and properly cooked, are good for the salts and vitamins, with the additional value of filling up the stomach to make the patient feel that he is not hungry. This dried material described would have about the same value as other dried vegetables. It certainly would have no value for the various disorders occurring in the body, assuming this to be a diabetes mellitus—there is a diabetes mellitus and a sugary diabetes and also a diabetes insipidus, the latter a condition in which the body is unable to retain water. These people are terrifically uncomfortable and may be really ill because they excrete such large quantities of water and their tissues become burned out so they drink large quantities of water. I had a student once who suffered from this condition who consumed three gallons of water daily. The treatment for inspidus is simply, as in the case of diabetes mellitus.

(Testimony of Dr. Clinton H. Thienes)

In neither case can we cure the disease. The patient will have it for life, if a true case. There may be temporary upsets leading to this condition, which are overcome, but I am referring to the real case which persists from months to years. The treatment is what we might call a "crutch" treatment in either case—the patient is made comfortable by controlling the disease. In the case of a severe type of diabetes mellitus, we give insulin. In a mild type we restrict the diet so that his own body is able to take care of the restricted diet. In diabetes insipidus, where he has to drink large quantities of water to replace the loss, the treatment is administration of an extract from the posterior lobe of the pituitary gland. That particular student whom I mentioned is now a very prominent young physician in Boston, controls his diabetes by snuffing the dried powder from this gland into his nose and getting enough to control his diabetes. He excretes a couple quarts a day, perhaps three, and he has cut down easily a fourth, so he is comfortable. If we tried to treat diabetes insipidus with dried vegetable of this type, he would still be excreting large quantities of water and would be a very uncomfortable person, if not definitely ill. In a few cases, it is the cause of a dehabilitation of the body by a continued loss of water and they actually die of intercurrent infections which ordinarily they might be able to overcome. The value of these capsules would only be to help fill up the patient's stomach and make him feel he had had something to eat, but would not have the value of fresh vegetables because the drying process causes loss of certain vitamins.

Referring to the following ailments, namely, acidosis, indigestion, calcium-starvation, diarrhea, brain irritation,

teething in children, tonic in acute diseases, constitutional weaknesses, emaciation, bone diseases, scrofulous and tubercular tendencies. (I would say there is no one drug which is of aid in the treatment of all those conditions.) The answer is the same as regards malaria, disorders and conditions of the liver, uric acid, ailments marked by excessive secretions of bile, derangements of the liver, gravel and sand in the urine, biliousness, headache and vomiting of bile, bitter taste, trouble arising from living in damp places, gout, and diabetes. I think the answers I have given represent the concensus of medical opinion; they most certainly do among the enlightened.

CROSS-EXAMINATION:

Upon cross-examination by Mr. Kellogg for the defense, the doctor continued his testimony as follows: I studied chemistry, particularly about the body, to prepare myself for my present occupation. Have been a practitioner and an experimenter in my reseach laboratory at the University. The school I attended was an allopath as distinguished from the homeopath, a regular medical school, a scientific institution. I had heard about the homeopathic theories of medicine and medical treatment, enough to adopt those things that Hahnemann and others of the founders proposed which we considered on the basis of scientific experiment, and scientific observations, to be correct. Regular medicine knows no sectarianism at all.

I do not recall studying Schussler's theories. The theory, however, that certain mineral salts were necessary remedies for the tissues of the body, as a concept, has received my consideration, but I would say the statement

(Testimony of Dr. Clinton H. Thienes)

that mineral elements are a cure-all for diseases would be a bad mistake. Certain diseases are amenable to mineral treatments. Others are not. My studies convinced me minerals had their value in the treatment of disease, surely.

He was asked if the medical profession had not even had drinking water in the reservoir impregnated with minute quantities of iodine as a preventative of thyroid disorders, and then he went on to say it had been done, but in his opinion the engineers of the city had as much to do with that as anybody—that there were at one time physicians who suggested that iodine be added in infinitesimal amounts so as to take the place of an iodine deficiency of the region, but that it was found to be a very wasteful practice and impossible to control the dosage, so the method had been discarded and iodine administered more carefully. I do not think the practice had a very wide acceptance.

His attention was then called by Mr. Kellogg to his oft-times mention of cancer, and he was asked if that was not one thing his profession had found no adequate cure for. He answered that radium, x-ray and surgery under proper circumstances and under certain types of cancer, were used. I mentioned that because it was a rather serious thing. He was then asked if he did not mention it to impress the jury with the possibility that a condition of acidosis might be the result of cancer somewhere in the body.

Thereupon Mr. Purdue stated:

I object to the question as wholly argumentative and improper.

THE COURT: It seems to me that is so. Sustained.

(Testimony of Dr. Clinton H. Thienes)

The doctor was then asked if it was not a rare thing for simple acidosis to result from cancer, and answered:—There are many things causing acidosis, and cancer is one. Then he stated: Acidosis might be a very serious condition without the person realizing it. Alcohol, heavy drinking of alcohol produces acidosis. I don't recognize the term "acid condition", for when an acid condition is found, death occurs. "Acidosis" is a technical term in medicine. The laity have a lot of misconception about medical things. I never carried out any experiments of my own to determine whether or not minute doses of calcium phosphate, triturated, as they call it, in the milk sugar would be assimilated by the body when taken as outlined. Other people made the experiments and I consider the question answered. There is no need of further experimentation. I relied upon the experiments of others about which I have read, heard or seen. I have had a patient who could not take cow's milk. I would not say they could not assimilate cow's milk. Usually the children who cannot take milk are those having an allergic condition where milk products cause hay fever, hives, asthma, or one of the other so-called allergic conditions, so to save them discomfort we deny the use of milk and substitute something for it. Allergy as understood by specialists in the field has to do with a special sensitivity to protein material. Others may define it a little more broadly than that and say that allergy is a sensitivity to any particular chemical or even physical agent—at least, it is a sensitivity to some chemical or physical agent producing asthma, hay fever or hives or eczema or other more rare manifestations.

(Testimony of Dr. Clinton H. Thienes)

About 15 of these tablets make a gram. 15 grains make a gram. These are one grain tablets that I have mentioned. I do not say that a quart of milk contains 35 grams of calcium phosphate. It varies from milk to milk, but roughly seven-tenths of a gram of calcium phosphate per quart—that would be two or three grams to the quart.

Rickets is a disorder of the bones in children. It is often known in young adults, and has been reported as early as six months. A ricketty child is irritable, he has a weak musculature. A rickety child does not sit up as early as a normal child and doesn't start to walk as early because his muscles are weak and the bones have a decreased calcium content. They are not as strong as they should be to bear the weight of the child and therefore there is a bowing or knock-knees and other deformities of the bones due to excessive weight on weakened structures. Then there is the failure of the laying down of bone at the point of growth near the end of the bone which is the chief thing we can see with the microscope or the x-ray picture. The condition is caused by excessive loss of calcium from the tissues. The body does not assimilate the calcium and lets it out through excretion instead of making bone. The retention of even this minute amount of calcium, however administered, would be beneficial and if the body did pick up calcium in any form and retain it and make bone, it would benefit the condition—that is, if it were proved—that would take a long and very careful scientific investigation, such as has already been studied and shown not to be, so far as this small amount of calcium is concerned.

(Testimony of Dr. Clinton H. Thienes)

I named other things than cancer causing brain irritation. Cancer is a malignant tumor. When we use the word "malignant" in describing a tumor, we mean a cancerous tumor which goes on and spreads through the body. Any tumor that keeps on growing in the brain is malignant in the general sense of the term, in that it causes great harm. I did not name all the causes of brain irritation, but mentioned those that came to my mind as the most important at the moment. Infections are one of the common causes of scar tissue in principal infections of the brain. There is no standard remedy for the treatment of all infections. Usually, in the food, we try to feed these people calcium. They get the calcium through the food they eat. There might be circumstances where we may properly give a pure calcium salt in the presence of infection, but we would give it in dosages of from 7 to 15 grains or more.

I have never made a determination of the maximum amount of calcium the human body will assimilate in a day. The requirements of an adult are between a half and a gram. If it were calcium phosphate, it would be three times that. It requires a half gram of calcium in the food to prevent a man from suffering calcium losses. That is, we excrete about a half a gram a day, so we must take in about a half a gram a day.

With children, it is a little more than that. It is up to a gram. The average for a child is seven-tenths to one grain, for an adult, half a gram. Children have growing bones, of course, and require a little more where with adults there is simply the wear and tear to be taken care of. Certain calcium salts are alkaline and certain types of acidosis may require, as a temporary measure, the ad-

(Testimony of Dr. Clinton H. Thienes)

ministration of alkalines in dosages of calcium carbonate, calcium phosphate or calcium lactate, in dosages of half a gram to several grains, in order to combat acidosis.

An excess of acid in the stomach would cause some people a sense of discomfort. Certain calcium salts are alkaline, but it would take a considerable quantity to neutralize acidity of the stomach—much more than is found in the tablets under discussion. It would take several hundred of them to make a dose.

In a normal growing individual, calcium is accumulated in the body if an adequate amount is given to take care of the requirements of the body. Everybody gets a certain amount of it in their food during the day, the average infant in its milk.

There is quite a wide range to the subject of food and chemicals in the body which is not understood by any of us. The medical profession started in on that phase of scientific research several thousand years ago and has been trying to find out ever since and is still at it.

In rickets we know that the lack of sunshine, or vitamin D, is responsible for the failure of the child to utilize calcium. He absorbs it but excretes it too rapidly, and if given the proper amount, the proper amount for the individual, retains sufficient calcium to have normal bone growth. There is an impaired ability to retain calcium in rickets, and then of course the digestive tract does not function normally. These children vomit a great deal, in severe cases, at least, some have diarrhea and some are constipated. There is a general nutritional disturbance and many things result from it apparently traceable to their inability to retain calcium. Diarrhea is sometimes

found associated with rickett*s*. It is also found associated with a deficiency in calcium. Rickett*s* is one of the diseases in which calcium of the body is not retained.

In the last twenty years the medical profession has made great strides in the treatment of tuberculosis; has found it is an infect*u*ous disease that changes the cell structure. The disease has a lot of different symptoms. Sometimes it takes the form of a fistula in connection with tuberculosis of the bone. Medical scientists have determined it is an infection process and I have accepted that as a fact. I think we can say in a general way that children, or any person, with a calcium deficiency might be more susceptible to tuberculosis or tubercular infections. I wish I knew what caused tuberculosis to become active. Of course, anybody harboring a tuberculous infection is below par, below his normal or what should be his normal. We feel, although we do not have proof of it yet because of poor control on the victims, other debilitating diseases may be responsible for a flare-up of an old chronic tuberculosis. It happens also in people who are apparently in very good health, so we cannot say definitely. It is almost a mystery yet as to what causes it. I have studied the milk treatment for tuberculosis and I presume one of the things in the idea of those who use the milk treatment is the calcium a patient will get. There isn't much in milk other than calcium—in the way of minerals, that are not found in greater abundance in other foods.

The blood calcium must be retained at a normal level of around ten milligrams of calcium. In order to retain that level for a normal vitality of all the tissues, the soft tissues of the body, the bones give off this calcium. I have investigated and found people who lost calcium con-

(Testimony of Dr. Clinton H. Thienes)

tent in their teeth or dentures from the lack of calcium in the blood, and the body picked it up from the teeth. That occurs in pregnant women, for instance. Syphilitic lesion in the mouth would be an entirely different proposition. They would have a syphilitic condition.

I have heard of other treatments for malarial disorders than an extraction of the cinchona bark, commonly known as quinine. There are certain other alkaloids that are known in rational treatments. One is asplamochim, another atebrine and they have specific indications. Quinine, or some other one of the mixtures of cinchona alkaloid is the treatment of choice, but these others are more specific and are used only where quinine is contra-indicated for one reason or another. In malarial disorders pretty heavy doses are used by my profession causing other effects in the body, as a rule not harmful. I have learned of experiments conducted involving the use of quinine in minute doses. A cure for malaria requires fairly good dosages. Calcium has no therapeutic value in the treatment of malaria. None of the mineral substances in the analysis quoted by Mr. Purdue would have any therapeutic effect in my opinion.

Rheumatism is a large term including a number of conditions. People who have gout, for instance—pain in muscles and joints, and so on. Certain types of bone disease associated with abnormal calcium metabolism in the body, are accompanied often by pain which a patient might call rheumatism. One is that adduced by a tumor of the parathyroid gland in which the bones lose great quantities of calcium due to the fact that there is a hyper-secretion of parathyroid gland. Calcium would have no benefit in correcting tumorous or cancerous conditions.

(Testimony of Dr. Clinton H. Thienes)

I mentioned stones in the kidney and said that surgical operations often would remove the stones. Some cases are inoperable. They go on to death. I have never known a case where the stones ultimately dissolved or passed without operation. There are precipitates of normal urinary constituents in the urine which could hardly be called stones, phosphates and urates which are sometimes precipi*tt*ed. Some are crystalline. Calcium would have a tendency to increase the tendency to precipitate normal urinary constituents. Many of these stones are calcium urate and insoluble. Calcium phosphates are insoluble except in decidedly high acid urine, so the administration of calcium in the presence of stones would in some cases, at least, be deleterious.

The medical profession uses diet in the control of diabetes as one of the things, also exercise, improvement of general hygienic conditions. In many cases it is true the pancreas does not function normally.

I never investigated to determine the effect of mineral salts and vegetable compounds upon the action of the pancreas, but it hardly meets with my concept of what constitutes a cure. I would say, however, that if one is going to restrict the diet of an individual, it is the thing to do to keep the stomach full so that the sense of hunger is decreased—not entirely abolished, but nevertheless decreased by giving low kaloid foods—foods of low carbohydrate content, and make them more comfortable. With diabetes mellitus, a patient can take care of 100 grams of carbohydrates a day, that is, if he has enough tissue of the pancreas, or other organs having to do with this disease there to metabolize 100 grams a day, and where he is accustomed to taking two or three or four hundred

(Testimony of Dr. Howard F. West)

grams every day of carbohydrates, to bring him down to 100 grams is going to control his diabetes to a point where he feels better.

We have found but very few specific remedies. We use a number of different drugs and remedies and extractions in the treatment of diseases. Those are what might be termed "aids", or have a therapeutic value. When administered in doses deemed proper under the proper circumstances, calcium phosphate, iron, and so on, would be indicated as a remedy and would have a therapeutic value.

I don't think there is a difference of opinion among medical men as to what constitutes a proper dosage. Those prescribed all cover about the same range. We are more or less unanimous in that regard—pretty well agreed.

DR. HOWARD F. WEST,

called as a witness in behalf of the government, being first duly sworn, testified, in substance, as follows:

I am a physician duly licensed to practice under the laws of California. I received two degrees from Stanford University, Bachelor of Arts and Doctor of Medicine. Spent two years in hospital work in San Francisco at the Stanford Hospital. (Witness continued to give his qualifications).

I practice internal medicine. The largest part of my work consists of dealing in what we call "metabolism", cases of nutrition and especially diabetes.

Diabetes is a condition characterized by the inability of the body to normally completely use derivatives of the food intake so that sugar that is derived from the food

tends to accumulate in the body and the excess sugar is eliminated in the urine, so that the patient tends to lose weight and strength as a result of this failure to utilize food normally and may develop various complications as a result of this fundamental defect.

It is associated with a failure of the pancreas gland to produce a sufficient supply of the chemical substance known as insulin. Insulin is necessary for the complete utilization of food materials, especially sugar, and certain factors in fats and all other types of food.

Diabetes may be very serious unless controlled. The patient may acutely develop a serious complication which is one particular type of acidosis, so called, and keytosis, which may result in serious illness, in coma and in death. The rate of death prior to the use of insulin in treatment, amounted to 60% of all patients with diabetes.

There are two or three fundamental principles in the treatment. One is an adaptation of quantity of food, as well as kind, limiting the patient to an intake of food to his particular limitations which may vary tremendously from one patient to another. If this limitation is not sufficient so that he cannot be adequately nourished and still control the diabetes, the next principle is to deliberately arrange his intake of food so it will be adequate for normal health and then to supply insulin in quantities sufficient to take care of the extra food allowed and still keep the equilibrium normal so he does not lose the benefit of his food by discharging sugar from the urine and breaking down his normal physiological equilibrium.

We determine that a patient has diabetes from the symptoms that are indicative of the disease. If final diag-

nosis, however, is necessary, it must be shown that the patient passes sugar of a certain type in the urine in a quantity that his blood sugar, as a measure of the level quantity of sugar in the body fluids is high, indicating again an inability to utilize the food normally, and that on a given known intake of food he excretes definite amounts of sugar in the urine. There are various types of conditions in which sugar may appear in the urine, from time to time, or unusual sugars that may appear in the urine that are not diabetes.

This is one disease where the effectiveness of treatment can be determined from objective evidence. If a patient is placed on a diet that is selectively arranged of food of known composition, all of which are weighed so that the intake can be determined, we can calculate how much sugar he will require each twenty-four hours, collect the urine for two or three days, of such intake of food, and measure the amount lost, quantitatively. We can tell, under the same conditions of measured known intake of foods, known amounts of sugar that he is taking in, whether he tends to lose appreciably less in the urine, indicating that he has, his body has been able to utilize an increasing amount. We can test the effectiveness of the therapeutic measure by testing them on the "diabetic dog", before trying it on patients. A dog becomes diabetic and behaves very much as a human being does who has diabetes, where its pancreas is removed, and it serves as a standard of test. We can first test the dog to find a safety factor before we institute various new or unusual types of treatment in the human being.

(Testimony of Dr. Howard F. West)

(At this point, an analysis of Liver Cell Salts as shown in the previous analysis was read to the witness and he was asked to assume whether or not such a preparation would be of any advantage in the treatment of diabetes when taken in dosages of three pellets every two hours for thirty days, then three pellets before meals, dissolved on tongue; babies, one pellet in each bottle.)

The witness stated as follows:

I could state very emphatically that it would have no therapeutic value in the treatment of diabetes, from the intensive study that has been made on this subject over the years. There are several reasons. One is the infinitesimal amount of the ingredients which would make them inadequate from the point of treatment. A little chemical calculation would show that one teaspoonful of milk would contain eight times as much calcium and twelve times as much phosphorus as 25 or 30 of these tablets. To expect any beneficial therapeutic effect from such material would be going well beyond the realm of reason.

A glass of milk, between six and seven ounces, would have 400 times as much calcium and 600 times as much phosphorous as 25 of these tablets. One would have to take from 25,000 to 50,000 a day to approach what is normally taken in with our food, in order to give an appreciable amount to meet the physiological requirements.

Another reason is that as yet no specific dependable treatment for diabetes that can be taken by the mouth has been developed throughout the years of controlled investigation. All types of mineral and vegetable matters have been thoroughly studied as well as animal extractions, and

so forth, and because of the peculiar nature of the condition they do not stand up as a dependable method of treatment and would not be expected to be of value in the majority of cases.

Likewise, there is no reason to expect such a preparation to have definite therapeutic value in conditions of malarial disorders, biliousness, diseases of the liver, uric acid diathesis, ailments marked by excessive secretions of bile, derangements of the liver, gravel, sand in uterine, biliousness, headaches with vomiting of bile, bitter taste, trouble arising from living in damp places, malaria and gout. There is no drug or remedy known which is a treatment for all the conditions I have mentioned, to my knowledge.

The witness was then read an analysis of the sample of "Alberty's Vegetable Anti-Diabetic Compound", as hereinbefore testified to, with the dosage prescribed as two capsules after each meal, and asked if that would be of any advantage in the treatment of diabetes, to which witness answered as follows:

From all investigations which have been made under controlled conditions, where one can measure the effectiveness of the preparations, it cannot be expected that any such mixture would be of any therapeutic value in the treatment of diabetes. It is not of any therapeutic value in the treatment of diabetes.

(Testimony of Dr. Howard F. West)

CROSS-EXAMINATION:

The witness, on cross-examination, testified substantially and materially, as follows:

Before the use of insulin the accepted effective method of treatment was that of controlling the total intake of food for each patient, a limit, high or low, but a limit on all types of food, carbohydrates, proteins and fats. I have found in some instances people tend to lose calcium as a result of diabetes if they are controlled and have what is called acidosis that may occur in the body. Milk is one of the foods prescribed for diabetic people, ranging up to a quart, one of the many reasons being that milk contains calcium. There is even some sugar value. Vegetables constitute a major portion of the diabetic diet, both the lower carbohydrates and those containing somewhat higher value; one of the reasons is because you want bulk to be given the patient so they will have the sensation of eating enough. It is important that the diet meet all the physiological requirements of the individual because the aim of the treatment is to restore the patient to as nearly normal health from all standpoints as is possible.

Yes, I came here prepared to testify regarding the chemical analysis read to me by the government counsel. I did not study at the homeopathic school of medicine. I have never investigated especially into the effectiveness of homeopathic remedies for different diseases. I base my opinion on investigations made on such subjects as diabetes regardless of type or theory or background of the school because, as I have said before, diabetes is one condition where one can measure what happens. I would not

(Testimony of Dr. Howard F. West)

attempt to qualify myself as a specific interpreter of homeopathic methods. I know all these things had been investigated in therapeutics from the standpoint of treatment and they have not stood up under the test of controlled conditions.

In answer to the question, "You are basing your opinion upon what your profession has done in the way of investigation into the homeopathic remedies, as well as especially these subjects?", the witness answered as follows:

We do not limit ourselves to the evidence produced, or the therapeutic value, regardless of the source. I have not investigated homeopathic methods. One of the methods of measuring the effectiveness of any remedy is whether it has a tendency to lower the sugar content in the urine. We known that the percentage of sugar will vary from day to day depending upon the other factors present, and one of the things one must know, when such problem is presented, when this tablet or that capsule or something else is given, what were the conditions prior to the institution of that particular method of treatment—the quantity of food taken per day, the value of the food taken, what the total loss of sugar in the urine was over a consecutive period of observation, and then, when the therapeutic method was applied, whether it consistently controlled the amount lost, and not on one specific day. One day would have no value at all. The fact that in one day patient has passed a specimen of three per cent sugar and the next day passed urine with a one per cent sugar would mean nothing. All the conditions would have to be satisfied, not just a specimen of urine. Diabetes is not

a curable ailment. The ideal treatment is to keep the patient in good health in spite of his diabetes. Insulin is added to make him take a diet that is adequate for good health, where indicated. As I have said, the principles of the treatment consist in diet regulation, insulin when necessary, and general hygienic control of exercise, and so forth. No other specific remedy than insulin has as yet been developed in spite of intensive controlled research costing thousands of dollars that will take its place.

Calcium in a simple form at certain times, if given in sufficient quantities to make up a deficiency, if it existed, would be a benefit in liver disorders.

RE-DIRECT EXAMINATION:

Where there is a deficiency of calcium found, the dosage would depend upon the degree of deficiency, usually not less than 15 to 20 or 30 grains a day—many times the purported analysis we have heard here—25 of these tables would represent 1-100th of a grain of calcium, according to the analysis, so that one would have to give several thousand times the quantity represented in one tablet to approach the valuable increase. As stated before, one ordinary food contains hundreds of times more mineral than these tablets do, according to the analysis. As far as I can obtain it from contact with leading physicians who are interested in this subject, and from voluminous literature, I feel that the views I *hve* expressed concerning diabetes represent the concensus of medical opinion.

(Testimony of Dr. Howard F. West)

RE-CROSS-EXAMINATION:

Yes, I know the work of Sherman in compiling various American dietaries.

After being asked if he was familiar with the United States Health Service Bulletin gotten out in 1920 in the Government Printing Office, the witness testified that he had various copies of certain things, but did not remember that specific one. He was shown the booklet and asked to read on page 35. He then read as follows:

"Compared to the average intake afforded by various American dietaries as compiled by Sherman, the intake of some, at least, of the mineral ingredients in the diet of our volunteers would seem to have been decidedly low. Thus, for example, Sherman considers that 0.45 grams of calcium approximates the minimum of actual daily need, while the average intake of the volunteers varied between about 0.13 and 0.20 gram during the period, after the buttermilk was excluded from the diet. With respect to phosphorus, the average daily requirement, according to Sherman, is 0.96 gram; the average intake by the volunteers varied between about 0.89 and 0.67 gram."

The witness was then asked if the findings of Dr. Sherman that the minimum requirement is .45 of a gram per day found support in the concensus of medical opinion. The witness went on to testify that that certainly was the minimum. It would take seven hundred tables to equal one gram, but it would reduce the number required if taken with a normal minimum diet mentioned by Sherman as .13 gram, that a very little bit of calcium added to the intake of those who were deficient, physiolog-

(Testimony of Dr. Howard F. West)

ically it might have value in proportion to the infinitesimal amount added, provided it is assimilated. That doesn't mean, however, that it is therapeutically curing diabetes or similar things of that kind, it had no specific value in correcting the conditions about which we have been talking. Any dosage, however slight, would be of some benefit, just as drinking water containing calcium.

RE-DIRECT EXAMINATION:

Certainly a teaspoonful of milk every day added to a person's diet might be of some benefit.

"THE COURT: Now, Doctor, respecting the schools of medicine, what relationship, if any, is there between the science that you have described—that is, the ascertaining by the most advanced medical authorities of the correct treatment of diabetes, or any disease, and the different theories, if there are—I have never yet understood what the homeopath is and what the allopath is—but, at any rate, a doctor seeking to find an effective remedy, is he controlled to any extent by any so-called theory of medicine as between the allopathic theories, if there is such, and the homeopathic theory?" to which the witness answered, "No, that never enters our mind. In investigating the behavior of diseased conditions, or the treatment, it is entirely the search for *for* those things that will be of benefit without regard to schools or types of so-called school, or anything else. We take no account of any theory of medicine."

THE COURT: What you are after is the result?

THE WITNESS: The result. After all, our standing depends upon results and our success depends upon it.

(Testimony of Dr. Howard F. West)

RE-CROSS-EXAMINATION.

The witness was asked the following question:

"I take it, however, from your answers, Doctor, that you believe that the means of curing diseases used by the homeopaths if they use remedies similar to those used here, have been found, upon investigation, not to have efficiency or therapeutic value, is that correct?"

to which the witness answered, It is my conviction that the homeopathic remedies would not be of benefit at all in diabetes. I personally have not experimented in that direction. As far as I can see from the analysis, there is nothing harmful in the substances themselves.

The witness further testified:– From experience, the harmfulness does not come from the poisonous effects of the remedy such as these, but the fact that the patient believes in his own mind that he is receiving adequate treatment so that he eventually, under those more serious conditions, when they are just fooled into thinking they are having some effective treatment, the condition goes on not infrequently—this is from practical experience—not necessarily with this preparation, but the patient, believing that he is being treated has developed acute dangerous complications of his disease because he has not been receiving the adequate treatment—just thinks he has—and gets into serious trouble. I have had to stay up many a night trying to get a patient over a severe acidosis and coma who had been treated by himself, or from some preparation that he has heard about and thinks that the thing is of value. I cannot give it to you specifically, but there are certainly a fairly large number of deaths from that source.

(Testimony of Dr. Egbert E. Moody)

DR. EGBERT E. MOODY

was called as a witness for the government, and being first duly sworn, testified in substance as follows:

I am a physician licensed to practice in California. I received a Bachelor of Arts degree from the University of Southern California in 1912 and my medical degree in 1917. I am practicing at Wilshire and Western in the City of Los Angeles, specializing in pediatrics, having to do with the care of sick and well children from the moment of birth until they pass into adult life.

(Thereupon an analysis of "Calcatine" was read to the doctor and he was asked if the preparation would be of any advantage in bone diseases in children.)

He stated in answer as follows:– Bone diseases, of course, include such a tremendously wide expanse of conditions, I would have to have such a question made specific before I could answer it. However, I can not conceive that such a drug or composition of drugs, in such a small quantity could have any appreciable effect on any of the various bone diseases which may be present in an individual. Some of the more common bone diseases in children are tuberculosis, sarcomas, which are cancerous conditions, rickets, and osteomyolitis. Those are very common diseases in childhood.

The witness was then asked to assume that "Calcatine" was given in dosages of three pellets every two hours for thirty days, then three pellets before meals, dissolved on the tongue; babies, one pellet with each bottle of milk, and was asked if the preparation would be of any use in the treatment of the bone diseases mentioned by him.

(Testimony of Dr. Egbert E. Moody)

The witness answered that it would not.

He then further testified as follows:

Calcium starvation in children is a very indefinite term. One might take a very mild insufficient amount of food and still not be starved. For the same reason, one might take a relatively small amount of calcium into the body and still not be starved. I would have to assume that such a question would be that there was an absolute insufficient amount of calcium intake to take care of the body's needs. Such conditions, in children, are exceedingly rare, in my experience. This preparation would be of aid in that condition only as it would supply about .001 of a grain of calcium to lend into the total needs of the body.

Assuming that a quart of milk contains one gram of calcium phosphate (approximately 15 grains), one glass of milk, 8 ounces) would have 5 grains. One tablet would be equivalent to .003 of a glass of milk, or the calcium content of the glass of milk, so that 1000 of these tables would equal in calcium about one quart of milk.

Witness thereupon corrected his testimony after the court questioned him about the comparison used, and then stated: There are 5 grains in a glass of milk and .001 of a grain in each tablet. It would take 5000 tablets to be the calcium content of one glass of milk and 20,000 for a quart of milk.

The witness then went on to testify: I cannot conceive of the term "teething in children" as an undesirable condition. Teeth are necessary for the normal function of the human body. I have seen a few children in my ex-

perience who have not cut any teeth. I would say that is a calamity. Occasionally we see children who have certain symptoms when teeth are cut. I have yet to see a sick child made sick by the cutting of teeth. Teething is a perfectly normal natural physiological process. I have seen everything blamed onto the cutting of teeth—everything from small pox to pneumonia blamed on the cutting of teeth. We have such very definite sympotoms as a slight, serous discharge—a watery discharge from the nose. The child may be slightly more restless than normal and there may be a slightly increased amount of spitting of food, not vomiting, and there may be a slightly increased looseness of stool and, rarely, a condition of constipation. Sometimes they cry at night, suffer from lack of appetite, but beyond that we see no difficulty with the cutting of teeth. There has never been shown any scientific fact, in the reading I have done, that any calcium deficiency has any effect upon the ultimate cutting of teeth and therefore the giving of calcium could have no effect upon the cutting of teeth. I have seen no such cases in my own experience. Even though it did have an effect, this particular remedy would not be of aid in the dosages indicated.

At this point, Mr. Purdue asked the following question:

"Now Doctor, would the preparation given in the dosage stated to you be of aid in the case of a child named 'June' who, since the age of two years had not been robust. She grew slowly, had no appetitie and suffered from malnutrition. Between the ages of 12 and 13 she had not gained any weight and grew less than one inch in height. At the—

(Testimony of Dr. Egbert E. Moody)

"MR. KELLOGG (Interrupting) Well, now just a minute.

That is objected to on the ground that no proper foundation has been laid. There is no showing that the Doctor ever saw this patient and it is going into the field of conjecture to determine whether or not those are true facts.

THE COURT: Why is the question material, Mr. Purdue?

MR. PURDUE: Why?

THE COURT: What are you reading from?

MR. PURDUE: I am reading from page 45 of the defendant's booklet "Calcium, The Staff of Life."

THE COURT: Is that something in evidence?

MR. PURDUE: Yes, sir; it is in evidence and it was the statement of conditions set forth and follows up the status on Alberty's treatment and gained seven pounds in weight and grew one inch in height in two months.

THE COURT: It is relevant.

The objection is overruled.

MR. KELLOGG: Note an exception, your Honor.

THE COURT: Yes.

Thereupon the witness stated: It seems to me the premise is insufficient and the question is irrelevant. We see many children—I believe the statement here was that she was 13 years of age when she had no appetite?

Thereupon Mr. Purdue said:—

"Yes. Let me read it again. 'Since the age of two years, had not been robust. She grew slowly, had no appetite and suffered from malnutrition. Between the ages of 12 and 13 she had not gained any weight and grew

(Testimony of Dr. Egbert E. Moody)

less than one inch in height'. So, at the age of 13 she started on Alberty's treatment and she is now 13 years old, and would that preparation which I have stated to you be of advantage to that child given in the dosages which I have indicated."

"MR. KELLOGG: For the purpose of the record, I would like to renew my objection on the ground it is incompetent, irrelevant and immaterial and no proper foundation.

THE COURT: Well, I understand that the portion of the booklet suggests that the child was aided or cured by the remedy, is that right? Isn't that it?

MR. PURDUE: Yes, your Honor.

THE COURT: Then it is perfectly proper to ask the Doctor's opinion, if he sees fit to give one, on the premises. It seems to me it being a recommendation of the defendant, for that reason it is proper.

MR. KELLOGG: I make the objection to preserve my right in the record and ask that an exception be noted to the ruling.

THE COURT: Yes, certainly."

Thereupon the witness stated as follows:

"There is no physical background read in the premises of this case to state that there was any physical cause for the reason that she was not robust and that she did not—"

At this point the court interrupted and said:

"THE COURT: You mean, Doctor—do you mean you are not in a position to know whether the administering of the remedies described would be of benefit or not?"

(Testimony of Dr. Egbert E. Moody)

The witness then stated: "I am trying to lay the groundwork as to why the child may not have grown or developed."

Thereupon Mr. Purdue stated:

"Well Doctor, regardless of why it was—regardless of the groundwork as to why she may not have grown or developed, I am asking you a plain question: Would this preparation be of any aid given in the dosages which I have stated to you?"

Thereupon the witness testified as follows:

"None whatsoever. We know that at puberty time the children make very rapid—at puberty a child—which may be at the age of 13, makes very rapid gains in height and weight of many pounds in a year and an inch or two or more in height without any medication whatsoever."

The doctor was then asked "if medication was indicated, certainly this particular medication would not be it, is that it?"

To which the witness answered "That is correct."

Thereupon the witness was asked by Mr. Purdue, the following question:–

"Now, Doctor, what do you say to this statement. I am reading from page 145 of "The Hour Glass": 'Calcium starvation may be brought about in a number of ways. To begin with, the majority of babies are now born calcium-starved and the deficiency has never been made up. Statistics show that 91 per cent of all the babies born are calcium-starved. A few generations ago, it was

only the premature infant that was born deficient in calcium.

'The foetus is a 'calcium parasite' because it requires a large amount of this element, and, in order to obtain it, it grows upon the maternal tissues in a way that often seriously impoverishes the mother, and even at that fails to get all it needs, and consequently it is born calcium-starved.' "

To the foregoing question the witness answered:

I think the statements are incorrect. There has never been any proof that any infant has ever been born calcium starved with the exception of two conditions, and that is in osteanagenesis, which is a condition where a child is born without a sufficient amount of calcium in the bones, the reason for which we do not know, and in certain conditions in which the children are born to mothers who suffer from a peculiar condition known as osteomalacia. Enough experimental work has been done to show that the calcium content of the blood of mothers is normal throughout the entire period of pregnancy and that that normal percentage of calcium will run from 10 to 11 milligrams per c. c. of blood of calcium, and that during the last months of pregnancy that there is a very gradual drop—not to exceed one milligram—of this calcium in the blood of the mother. There has never been a proven case of rickets in the newborn.

"The statement made about 'prematures' is absolutely incorrect. I judge that the reason that such statement is made and that it caused rickets is more commonly seen in the premature than in the full-term child, but the reason is very evident, because the demand of calcium on

(Testimony of Dr. Egbert E. Moody)

the premature, which grows very rapidly, is the reason for the calcium deficiency, but it never occurs in the normal-born child of normal parents.

"We have a normal natural consistency of blood, as shown time and time again by work at our hospitals, that the calcium content of the blood of the newborn is absolutely normal.

The witness was then asked, I take it that the answer you have already given, namely, that this preparation, in the dosages stated, would be of no aid in calcium deficiency applies to the particular circumstances now stated?

The witness answered, "That is correct."

He was then referred to page 231 of "The Hour Glass" and asked if the preparation "Calcatine" would be of any aid, in the dosages indicated, in case of a baby born with inherited syphilis. The doctor answer that it would not.

CROSS-EXAMINATION:

Upon cross-examination, the witness stated substantially and materially as follows:

I have seen two cases in my career, of children who did not have teeth at all. There simply was no tooth-bud formed. Something went wrong in what we speak of as the embryology of the embryo so that part of the embryo which went to the development of the teeth wasn't there. We do not know the reason, and nobody else does. It was probably inherited, because something went wrong in the technical term of what is commonly known as the chromosomes, the germ cells. Such children were not deficient in calcium. They were otherwise normal. I

have never seen a child cut teeth in which teeth we found a deficiency except in one instance, where the child had some sort of teeth which were very rapidly lost after birth. Occasionally we see deformed teeth, deformed in shape and content. Almost universally they result from syphilis, but I have never found any deficiency of calcium or inability to retain calcium where the teeth were so deformed. Lancing of the gums so the child can teeth is usually a procedure of immediate value, when there has become an actual cyst over the tooth due to pressure, and the gums are lanced to relieve pain in the individual. Teething is not a painful process. It is a physiological process and is a condition of no more pain, under average circumstances, than the secretion of saliva. The pain and crying often attributed to teething are probably a reflection in the child having little to do with pain. There is a definite reaction set up. I remember cutting my wisdom teeth, but I have had many gum boils in my mouth which have been more painful than the process of cutting wisdom teeth. We observe conditions in children, and depend upon observation how that child deviates from the normal.

The cause of rickets is a deficiency in what we call the "Vitamin D factor", due to the absence of sunlight, or the intake of the Vitamin D Factor in codliver oil or viosterol. There is secondly the inability to absorb calcium from the bottle and some factor entering into it which is not clearly understood by which utilization of calcium in the blood stream is not made available to the process in the body where it is needed—that is, the deposit of calcium in the growing ends of long bones or other bones.

(Testimony of Dr. Egbert E. Moody)

There are many cases of rickets in which there is a perfectly normal calcium left in the blood stream. Many times we see much more lowering of the phosphate content in the blood than we do the calcium content, although both may be definitely lowered. The cause of rickets is a failure of the Vitamin D factor and a result thereof, inability to use what calcium may be present where it is needed for growing bones. Rickets is one of the most common diseases in children which we have. There has never been a true case before the age of six weeks and almost invariably it is seen under two years, mostly manifesting itself by six months. With the two exceptions given, scientific investigation has never been able to satisfactorily prove calcium deficiency at birth, and those exceptions are exceedingly rare. In rickets calcium cannot be absorbed—is not absorbed, and in the next place, the calcium level of the blood may be lowered and the thing which makes rickets is the failure to deposit calcium in the bones.

Chromosomes have been shown under the micrscope in certain animals, but not humans. They come out of the germ cell of the mother and out of the germ cell of the father. They are the means by which we gain our inherent characteristics. Those things we call hereditary come from the chromosomes. It is a mystery as yet how they operate. I can say, however, that rickets is not a hereditary tendency. It depends on physiological conditions or something in the environment. It may relate to an inability to get sunlight. It has no relationship to diet. A diet may be normal and the child still suffer from malnutrition. Rickets is not a malnutrition disease. It is a deficiency disease. We prescribe a vitamin D fac-

tor for it. Providing calcium has nothing to do with curing rickets. A child affected with rickets shows evidences of some gastro-intestinal disorders, but only in the same way that a case of pneumonia may give rise to intestinal dist*ru*bances. Gastro-intestinal disorders are not part of pneumonia nor a part of rickets. You never see rickets in a small infant. It is only in rapidly growing children that you see actual rickets. When I say "small", it is for their particular age. There has not been any investigation, to my knowledge, to determine whether the tissue cells, other than bone substances, are also deficient in calcium content. After the vitamin D factor has been added, we do not find difficulty in the assimilation and retention of calcium in rickets. We do not give calcium, we give vitamin D factor. There have been a few cases on record where vitamin D did not affect a cure. In such cases we usually wind up by having a constant case of rickets. At present, there is nothing we can do about this circumstance. It is an exceedingly rare one. I have seen only one such case in twenty years experience. 999 out of 1000 can be cured of rickets. It is in these others, which are not the average things, which we base our knowledge upon. I haven't any direct experience in using the substances mentioned by Mr. Purdue on direct examination, for the simple reason that I must know what it is before I prescribe it, and when I would realize the extremely small content of anything therapeutic in this product, I wouldn't use it because it would be of no value.

I did not study homeopathy. I have investi*a*ted into the efficiency of homeopathic remedies, but not as such. I rely upon any proven scientific fact presented to me regardless of what school it comes from. I cannot state

(Testimony of Dr. Egbert E. Moody)

any particular instance where I have ever relied upon any scientific fact that came to me from the homeopathic school of medicine. I know there are very few of them in the United States. I do not know where they are. I would not say the homeopathic system of medicine is discredited, but when any product is given to us which has been proven by experiment that it accomplishes certain physiological processes bringing about certain conditions or certain therapeutic effects, we would accept that product regardless of the school it might come from, but I know of none from that school that I use.

RE-DIRECT EXAMINATION

Upon re-direct examination, the witness was asked if "Calcatine" would be easier to assimilate than the calcium in a glass of milk, and he answered, "No, it would be apparently the same because both are calcium phosphates, and one would be as easily assimilated as the other.

RE-CROSS-EXAMINATION

On re-cross-examination, the witness testified as follows:

In my opening remarks I stated it would be of the same advantage as so many added ounces or drops of milk.

At the conclusion of the examination of this witness, Mr. Purdue stated that was the government's case, and the government rested.

(Testimony of Elwood Leon Rudolph)

The first witness called for the defense was

ELWOOD LEON RUDOLPH,

who, being first duly sworn, testified substantially as follows:

I am buyer for the Drug Department of the Broadway Department Store, and have been for twenty-two years. I have handled Alberty's Foods for better than twenty years. The other day a Government man come in and wanted to know if we handled Alberty's Foods and if we had many returns on it, and to give him a correct answer, I looked up and found that we had about $5.50 worth of refunds in the entire year. I have the return claim tickets on the refund.

The objection was overruled.

The question was not answered, and the court questioned the witness as follows:

"THE COURT: What is your line of business?

"THE WITNESS: I am manager and buyer of the Drug Department at the Broadway and have been for 22 years, buying the entire line of Alberty remedies."

The court then asked if he knew the difference between "Calcatine" and others. The witness stated they all come labeled, in different bottles and packages, and that he knew the extent of their being in different bottles. The witness then proceeded to answer the question as follows:

We had three only Alberty one-pound foods, two only Infant Foods, and one only Berry Juice which we took back and the customer asked for credit on account of them.

(Testimony of Elwood Leon Rudolph)

The witness further testified:

It would be very hard to say what volume of sales we have had of Calcatine, because to give it accurately, I would have to check up on my records. I cannot testify as to certain commodities as distinguished from others of Mrs. Alberty, because they are all under the classification of "Alberty's Products", which is the way we classify her preparations. I know that we have sold thousands of dollars worth in the last twelve years. I have seen a great number of babies, before and after they were put on Alberty's Preparations, and the reason for that was that when she first came in our store she—

"MR. PURDUE (Interrupting) Now, just a minute. I object to that as not responsive to the question, and it is also hearsay. The witness was asked if he had seen certain babies and the answer was 'Yes'.

"THE COURT: Yes. The remainder of the answer may go out. The objection is sustained."

The witness then said:

"When Mrs. Alberty asked for space in the store and told me what her—

"MR. PURDUE (Interrupting) Your Honor, I object to what Mrs. Alberty told this gentleman.

"THE COURT: Yes, It is improper."

The court then went on to ask the witness:

"THE COURT: I understand you to say you saw the babies before and after?"

The witness replied: I have seen a great number of babies before and after taking the preparations.

(Testimony of Elwood Leon Rudolph)

At this point Mr. Purdue interposed an objection to questions propounded to the witness unless the witness stated what products were referred to. Mr. Purdue then went on to say:—

"If he is referring to Alberty's Foods I object to it as being wholly immaterial to the case. If he is talking about "Calcatine" or "Liver Cell Salts", that is another proposition."

The witness then went on to testify:—

I saw babies whose mothers said they had taken the Alberty Preparations. I have not talked with my employees as to whether or not the babies took Calcatine.

The witness was shown two pictures of "Donnie", and asked where he first got the pictures. The witness then stated that they were brought into the store to a Mrs. Lyon, who was his demonstrator. Then followed some colloquy about the pictures shown to the witness, and the court then asked the witness as follows:

"THE COURT: These were not pictures that you took?

"THE WITNESS: No, sir.

The witness stated they were shown to him by Mrs. Lyon, the demonstrator, who had received them. The witness further stated Mrs. Lyon was in the court room. The witness was shown a letter, and asked if that was shown to him by Mrs. Lyon at the same time. These were then offered as defendant's Exhibit "C" for identification.

The witness then went on to testify as follows:—My department is still handling Alberty's Products. I don't recall mothers having said they gave Calcatine, but I

(Testimony of Elwood Leon Rudolph)

remember mothers telling me they gave them Alberty's Products. Whether that is Calcatine, I don't know. The witness was then shown government's Exhibit No. 10, page 59, and asked if he had seen that baby, to which Mr. Purdue interposed the following objection:

"MR. PURDUE: I object to the question as being wholly, incompetent, irrelevant and immaterial as it is appertaining to Alberty's Foods, which is not an issue in this case, and it so appears from the Exhibit itself."

Defense counsel explained that the defense expected to have the original in court and wanted to prove by the witness on the stand that he had seen him before and after the picture was taken.

The court then stated the court felt the testimony of the witness was not very satisfactory because the witness could not state whether or not he had seen the original of that photograph.

CROSS-EXAMINATION

On cross-examination, the witness testified his store sold thousands of dollars worth of Mrs. Alberty's preparations.

RE-DIRECT EXAMINATION

Upon re-direct examination, the witness stated that included in that were Alberty's Foods, Calcatine, Lebara, and Liver Cell Salts, and that he was still selling her products and was selling Liver Cell Salts under a different name; that the change in name took place about the time Mrs. Alberty got back from introducing her products in the east. He stated he was not selling Calcatine under that name, but under the name of "Ca-Mo"; that it had been changed about the same time as the Liver Cell Salts.

(Testimony of Beatrice Lyon)

RE-CROSS-EXAMINATION

On re-cross examination, the witness stated he could not remember what year he started selling Calcatine or Liver Cell Salts.

BEATRICE LYON

was next called as a witness for the defense, and having been duly sworn, testified, in substance, as follows:

I am a representative of Mrs. Alberty at the Broadway Department Store, and have been employed as such for three years, selling Mrs. Alberty's Products. When I started, I was selling Calcatine, but discontinued about a year or eighteen months ago. I cannot tell the exact time. When I started I was selling Lebara Salts under the old label, but at the time Calcatine was changed, started selling it under the new label. I understood the change at the time was in connection with some interview which Mrs. Alberty had with the Food and Drug Department. I often sold Calcatine and do sell CaMo separate and apart from the other remedies. Often I sell it in conjunction with the food, the same with Lebara. I have had opportunity to talk to customers when they come in to buy these foods.

The witness was then asked as follows:

"Have you learned from them whether they were under a complete calcarea treatment?"

"A Sometimes—

"MR. PURDUE (Interrupting) Just a minute. Your Honor, I object to the question as calling for hearsay evidence.

"THE COURT: The objection seems to be good.

(Testimony of Beatrice Lyon)

"MR. KELLOGG: Obviously, your Honor, I cannot bring in all the customers. I have to bring in what they said.

"THE COURT: The objection is sustained.

The witness then went on to testify, in answer to further questions:

I don't sell Lebara as a cure, nor do I sell Calcatine, or Ca-Mo as a cure.

She was then asked, "In talking about it to the people who are prospective buyers, what do you tell them?"

The witness stated: It would be hard to answer because I did not always say the same thing to my customers. I never tell them it is a cure-all or a cure for diabetes. I never have told them any preparation was a remedy or cure for acidosis. I have never told them any of these were remedies or preparations for the cure of anything. I have suggested that they would aid them, in conjunction with the food most always—that is the Alberty foods. I have sold the preparation known as Alberty's Anti-Diabetic to people who stated they were diabetic. Usually the people who come in and ask for that are people who know about it and just come in and ask for it and they have told me they have known others that have used it, and get it on some one else's recommendation. It is now known as Alberty's Vegetable Compound. The label was changed at approximately the same time as Calcatine and Liver Cell Salts, in conformity with an interview which I understand Mrs. Alberty had in the east. Some of these people came in and told me they had lowered the sugar content in their urine.

(Testimony of Beatrice Lyon)

At that time Mr. Purdue interrupted with an objection as follows:

"MR. PURDUE: I will object to that and move that the question and answer be stricken, your Honor, for the purpose that it is hearsay testimony. If they have some people they claim have been cured of diabetes by the so-called diabetic remedy, I think we are entitled to have them here before the Court and jury themselves. That is the purpose of my objection, in the interest of proof."

The objection was sustained.

The witness was thereupon shown Defendant's Exhibit for Identification No. C, two pictures of a baby and a letter, and asked where she first received them. The witness stated the mother sent the photographs to an employee in the store who told her about Alberty foods.

Upon motion of the prosecution, the statement was stricken.

Witness then went on to say:—The letter came in the United States mail. The employee to whom I refer was Mrs. O'Connell. Mrs. O'Connell is in business for herself now some place in Los Angeles. I do not know exactly where. After I sent the food to this baby at Tucson, Arizona, I saw these pictures and the letter. I sent Alberty's Food and calcium tablets to this baby all on the same order for some months. I know the name of the party in Tucson to whom it was sent. I never saw the baby, but the pictures came with the letter.

The letter and pictures were offered in evidence.

(Testimony of Beatrice Lyon)

"MR. PURDUE: I object to the offer for the reason that it is hearsay, no foundation has been laid."

The objection was sustained.

The witness was then asked if she had shown the pictures and letter to Mrs. Alberty, and she went on to testify as follows: I showed the pictures and letter to Mrs. Alberty. I don't think I let her have the pictures to copy them for the book. I think the mother sent the pictures to her. I knew the address of the customer. Aside from the Food and Calcatine, no other products were sent.

CROSS-EXAMINATION

Upon cross-examination, the witness testified as follows: Yes, I have in my department Alberty literature for distribution.

The witness was handed a book called "Calcium, The Staff of Life, by Adah Alberty", and asked if she had that book in the store. She stated they had. She was shown a pamphlet designated "Alberty's Treatment for Diabetes", and asked if she had that in the store, and she stated she had. She was then asked if she made any representations to customers about the value of the products when they bought them, and to that question she proceeded to testify as follows:

No. The majority of my customers are people who have—one customer tells another, and as a result, they have heard of it and they come in after it.

(Testimony of Beatrice Lyon)

At this point, Mr. Purdue offered in evidence the book in the following language:—

"MR. PURDUE: Now, your Honor, for impeachment purposes, I offer in evidence the book which the lady has identified as being the one in her department, and I desire to read it to the jury, the first paragraph on page 46, concerning Ca-Mo, formerly Calcatine."

Mr. Kellogg then stated:

"MR. KELLOGG: I again object at this time to the introduction of that book or to the reading of any part of it by counsel for the Government upon the ground it is incompetent, irrelevant and immaterial and upon the further ground there has been no proper foundation laid. I have authorities on that point, your Honor."

The objection was overruled. Exception noted.

Thereupon Mr. Purdue read from page 46 as follows:

"Ca-Mo.

"Calcium is essential to health and long life.

"Ca-Mo (formerly Calcatine) is of homeopathic origin, triturated with sugar of milk, which is a food instead of a talcum powder which is non-assimilative.

"Alberty's Ca-Mo helps to offset acidosis and 'speeds up' cell reproduction by supplying a base for the new cells. Alberty's Food supplies the body with its daily need of calcium, the more calcium supplied, the sooner one will recover health. The entire body feels its revitalizing effects. Ca-Mo is especially beneficial and a valuable remedy in anemia, tuberculosis, all chronic or wasting diseases, swollen glands, ulcers, headaches, too rapid decay

(Testimony of Beatrice Lyon)

of the teeth, pimples, neuralgic rheumatism, prevents gall stones, acidosis, Bright's disease, goitre, pancreatic diseases, etc. Ca-Mo is not a medicine, but a valuable tissue and cell salts. Ca-Mo may be used alone or in conjunction with Alberty's Food, Lebara Pellets, Phosphate Pellets, or Alberty's No. 3 Tablets. $1.00 per bottle, six bottles $5.50."

Thereupon Mr. Kellogg moved as follows:

"MR. KELLOGG: At this time I make a motion that the statement referred to by counsel be stricken from the record upon the ground it is incompetent, irrelevant and immaterial, no proper foundation laid and not within the issues and charges here confronting the Court and the jury, not within the issues in the information and upon the further ground that it is highly prejudicial.

"THE COURT: Objection overruled.

"MR. KELLOGG: Exception.

Thereupon Mr. Purdue stated to the court as follows:

"MR. PURDUE: Your Honor, I further desire two paragraphs from Alberty's Treatment for Diabetes, which this witness has identified."

Thereupon Mr. Kellogg again asked, "May I note an exception", and the court then stated as follows:

"THE COURT: This, remember, is cross examination and the ruling has been made on the theory that it is proper cross examination.

Now, then, the witness must be shown to be directly connected with any document that you are reading, and I rather think it is competent that her part may be shown also."

(Testimony of Beatrice Lyon)

Mr. Purdue then asked the witness if she had identified the pamphlet as being for distribution in her department in connection with the sale of products, to which the witness answered that it was; that it was in the department under the sign "Take one"; that she had not digested it entirely, but had glanced over it.

Thereupon Mr Purdue stated he wanted to read two paragraphs of the document to the jury.

"MR. KELLOGG: Just a minute. This is a new and different objection. It has not been offered in evidence yet and it isn't marked as an exhibit.

"THE COURT: It must be placed in evidence.

"MR. PURDUE: I offer it in evidence as the next exhibit.

"MR. KELLOGG: To which the defendant objects upon the ground it is incompetent, irrelevant and immaterial and not within the issues of this case and upon the further ground that no proper foundation has been laid.

"THE COURT: Overruled.

"MR. KELLOGG: We note an exception."

The exhibit was introduced in evidence as Government's Exhibit 13.

Mr. Purdue thereupon read as follows:

"The Alberty Treatment for Diabetes.

"The Alberty Treatment has proved very successful in diabetes with adults and children. It helps to renew the pancreatic cells which are atrophied and inactive, improves digestion and the metabolism of starches, fats and sugars.

"It proves a blessing to those who dread glandular injections and are forced upon a restricted, weighed diet.

(Testimony of Beatrice Lyon)

"One of the most effective items included in the treatment is the vegetable compound capsules."

Thereupon the witness was turned over to the defense for re-direct examination.

RE-DIRECT EXAMINATION

The witness testified upon re-direct examination that she did not know when the Government's Exhibit No. 13 was first placed on the counter in its present form; that the literature came in a big carton, was opened and brought down there, and whether it was there before she came, she didn't know; that they were separate, and on the counter; that sometimes she suggested that the customer take a book with them to read; that this was all within the last three years.

Thereupon Mr. Purdue interposed as follows:

"MR. PURDUE: This literature has been used at the Broadway and sold right down to the present?"

Mr. Kellogg thereupon made the following objection:

"MR. KELLOGG: That is objected to upon the ground that it is incompetent, irrelevant and immaterial What she is doing today is not a part of this charge.

"MR. PURDUE: It goes to the good faith, your Honor.

"THE COURT: Objection overruled.

"MR. KELLOGG: May I note an exception.

"THE COURT: Yes.

(Testimony of George H. Hyland)

The next witness called in behalf of the defense was

GEORGE H. HYLAND,

who being first duly sworn, testified as follows:

I have attended this trial since it commenced, under subpoena by the Government. I am manager of the Homeopathic Pharmacy, 317 West Eighth Street, Los Angeles, and have been since 1910. We manufacture the products described in the information and of which I heard the Government offer an analysis, and I recognize two of the products as those manufactured by us. Their homeopathic names are calcarea phos and calcium phosphate, natrum sulphuric. They are standard remedies used in the homeopathic school of medicine, and have been sold by me under their homeopathic names for a long time, since 1903 in Los Angeles.

CROSS-EXAMINATION

On cross-examination, the witness was asked by Mr. Purdue the following:

"Q. You say you are under subpoena by the Government? You are still under, are you not?

"A I think so.

"Q Now, I will ask you if it isn't a fact that you yourself are now under indictment here in the Federal Court for also selling cell salts as well as manufacturing them?

"MR. KELLOGG: Just a minute, your Honor. I object to that upon the ground it is incompetent, irrelevant and immaterial, and not proper cross examination. This

man has not been shown to have been convicted of any offense.

"MR. PURDUE: It goes to the interest of the witness.

"THE COURT: He has not been convicted, no, but he has not been asked that.

"However, the interest and possible bias of a witness may also be shown. It is not a very nice thing to bring up the subject that a man is under indictment. That is distasteful, but at the same time, I see no reason why, as a matter of cross-examination, the witness should not be questioned concerning a situation which shows a possibility of feeling or bias.

"MR. PURDUE: It is on an entirely different theory from anything like a commission of a felony.

"MR. KELLOGG: I can understand that, your Honor, but I want to point out there was nothing from what I asked on direct examination to which counsel can take exception. If there is any misstatement, he could bring it out in cross examination. He cannot go beyond stating that.

"THE COURT: That objection will have to be overruled, under the law, I think.

BY MR. PURDUE:

"Q Answer the question, Mr. Hyland.

"A Repeat it, please.

"THE COURT: Suppose you modify it to the extent that the witness is subject to some adverse procedure on behalf of the Government along the same lines.

"That is correct, isn't it?"

(Testimony of George H. Hyland)

The witness thereupon testified as follows:

Not by the name they gave those. Not by the name you gave. Some of the same preparations, however, under their ethical name, but some of the same preparations which I sold to Mrs. Alberty and which she designated by the name of Alberty's Liver Cell Salts. I am not a physician.

I sold the preparations in bulk to Mrs. Alberty, by the pound, as every pharmacy house in the United States does.

He was then asked the following question:

"Q And your price for cal-phos was, to her, $1.00 a pound, was it not?

"MR. KELLOGG: Just a minute. I assign that, your Honor, as prejudicial error, and ask that the jury be instructed to disregard it.

"THE COURT: Strike the statement and let the answer—there is no answer.

"MR. KELLOGG: No, our objection was sustained.

"MR. PURDUE: That is all.

RE-DIRECT EXAMINATION

Upon re-direct examination, the witness further stated: I have read the standard works on the homeopathic school of medicine many times. I am familiar with their theory and practice.

Thereupon the court interposed with the following statement:

"THE COURT: One moment. Do I understand, Mr. Hyland, that you manufacture the remedies that are sold by Mrs. Alberty in this case?

(Testimony of Cecil Craig)

"THE WITNESS: We manufacture a full line of homeopathic remedies and preparations; yes, sir.

"THE COURT You manufacture and you sell them to her as well as to anybody else?

"THE WITNESS: To physicians and anybody who buys; yes, sir.

"THE COURT: The Government does not contend that there is anything unlawful in that action, of course?

"MR. PURDUE: No, your Honor.

"THE COURT: It is perfectly legal to manufacture anything that is not poisonous."

Thereupon Mr. Purdue questioned the witness upon re-cross examination as to whether or not Mrs. Alberty was his biggest single buyer in the products mentioned, and he stated that he thought probably she was, but could not answer until he went over the books, as he had many customers.

The next witness called for the defense was

CECIL CRAIG,

who being first duly sworn, testified substantially as follows: I am a pharmaceutical chemist and druggist. Received my education at the University of Southern California where I attended the College of Pharmacy, graduating in 1928. I have been employed by Mr. Hyland at the Standard Homeopathic Pharmacy since, where he manufactures drugs and products. I have learned the formulas of homeopathic remedies, particularly Schussler's cell tissue remedies. I know the particular items sold to Mrs. Alberty and prepare them. One was calcarea phos,

(Testimony of Cecil Craig)

the full name being calcium phosphoric. The witness thereupon went on to describe the process of preparing and manufacturing calcium phosphoric and described the strength of the article.

The witness thereupon further testified as follows: That is the same way the article is manufactured in the homeopathic school of medicine for physicians or by any homeopathic pharmacy. We have some 20 or 30 homeopathics buying from us locally. Dr. Clark, who testified here, is one of our customers. He has bought the tissue remedies from us. Calcium phosphoric is one of them. The real name for natrum sulphuric is sodium sulphuric. We manufacture that for Mrs. Alberty. We manufacture the same products for homeopathic doctors. The witness stated that Dr. Clark was one who bought these tissue remedies; that he made natrum sulphuric in the same manner as he manufactured calcium phosphoric except that he used sodium sulphurum in place of calcium. He stated there was another combination powder manufactured of different tissue remedies in combination for Mrs. Alberty under a private formula, but it was not one under discussion in this case. He further testified that he had sat in the court room throughout the trial under subpoena by the Government, although called by the defense. He was not taught the homeopathic remedies and constituent parts at U. S. C. There is no college of pharmacy in the United States that teaches homeopathic medicine. It has to be learned by practical experience. He had taken a course in chemistry. He was licensed in the State of California as a licensed pharmacist and was entitled to prepare prescriptions for allopath physicians.

(Testimony of Cecil Craig)

CROSS-EXAMINATION

On cross-examination, the witness was asked the following:

BY MR. PURDUE:

"Q There are 7,000 of these cal-phos tablets in a pound, are there not, which you sold to Mrs. Alberty?

"A Approximately.

"Q And you sold it to her at a little over $1 a pound, did not not?

"MR. KELLOGG: Just a minute. I object to that on the ground it is incompetent, irrelevant and immaterial and counsel knows it is and it can not be anything but an attempt upon his part to get error into the record, prejudicial error.

"MR. PURDUE: It is proper to show the great profit in these.

"MR. KELLOGG: He has tried throughout his examinations to get before this jury the fact that my client makes a profit. Of course she makes a profit, but that is not the gravamen of this charge and has nothing to do with it and I cite it as prejudicial error and ask the Court to instruct the jury to disregard it.

"MR. PURDUE: It goes, your Honor to the good faith of the witness, the great profit this defendant makes in these things.

She buys 7,000 for $1 and sells 150 for $1

"THE COURT: That is not the charge in the indictment. The fact that she does doesn't make any difference. It doesn't matter how much one makes. I regard

(Testimony of Cecil Craig)

the element of profit as an immaterial issue. The objection is sustained.

"MR. KELLOGG: May I have the instruction asked?

"THE COURT: The jury will, at the proper time, if they should need any instructions, be carefully instructed to the effect that they must disregard, among a lot of other things, evidence offered and not admitted, as well as evidence that has been admitted and later is stricken out. I do not think there is any necessity for making any special reference to it.

"MR. KELLOGG: This, of course, is not evidence stricken out, but it is a remark of counsel in his question.

"THE COURT: You do not think counsel is urging the question in good faith, I am sure, but the Court takes the opposite view. There is an objection, and it is sustained. Proceed.

"MR. KELLOGG: May I note an exception, your Honor.

"THE COURT: Yes.

BY MR. PURDUE:

"Q Your company has done this business with Mrs. Alberty for years, selling her various products, have you not?

"A We have.

"Q And she is far and away your biggest purchaser at present in cal-phos, isn't she?

"A In that one particular item, yes.

"THE COURT: What is your answer?

THE WITNESS: In that one particular item, she is the largest single purchaser locally.

(Testimony of Dr. Hovey L. Shepperd)

BY MR. PURDUE:

"Q And she is also the biggest purchaser of your natrum sulphate, is she not?

"A Locally, yes.

"MR. PURDUE: That is all.

RE-DIRECT EXAMINATION

Upon re-direct examination, the court questioned the witness as follows:

"THE COURT: Would you say she is your biggest customer?

"WITNESS: She is our biggest customer in that one item.

"THE COURT: Generally?

"THE WITNESS: Generally, she is one of our smallest customers.

The next witness called on behalf of the defendant was

DR. HOVEY L. SHEPHERD,

who being first duly sworn, testified substantially as follows:

I am a physician, admitted to practice in the State of California, and have been engaged in practice here since December, 1909. Before that I practiced in a suburb of Boston, Massachusetts—Winchester. I started in practice the 6th of June, 1895. I took my professional education at Boston University, both my C. L. A. and my Bachelor Degree. I went from the C. L. A. Department into the Medical Department. At the time I went there, Boston University was teaching homeopathic medicine. I am a homeopathic physician. When I was there, I used

(Testimony of Dr. Hovey L. Shepperd)

to be over at New York about every other year, sometimes every year, taking special courses. I know Dr. William Boericke and I know his works very well. I am familiar with all of Dr. Boericke's works.

The witness was then shown a book which he examamined. This was one we used a great deal, but we went far beyond the twelve tissue remedies. It was and still is a standard book. Both Dewey and Boericke are well known men. This book is just Schussler's twelve tissue remedies.

The book was marked for identification as defendant's Exhibit D.

The witness was then shown another book entitled "Pocket Manual of Homeopathic Material Medica" by William Boericke, M. D. He then stated:– This is something with which I am very familiar for I taught material medica for twelve years. This is my standard text book. I taught in Boston University. I am somewhat familiar with the biochemic system of medicine. Schussler was the man who brought out that theory of cure.

The "Pocket Manual of Homeopathic Materia Medica" was marked defendant's Exhibit E for identification.

The witness continued: I am familiar with the works of E. H. Ruddock, M. D., entitled "The Stepping Stone to Homeopathy and Health", edited by William Boericke. Anything Boericke wrote is a standard work, no matter what it is. I have read it. Its statements are substantially true. As far as it goes, it is dependable. You

(Testimony of Dr. Hovey L. Shepperd)

would not call a book of that type, perhaps, a standard work like Boericke's "Materia Medica".

The book "The Stepping Stone to Homeopathy and Health was marked Defendant's Exhibit F for identification.

The witness continued as follows: Nearly 100 years ago Schussler discovered the twelve tissue remedies. The twelve are only twelve of about 200 of the homeopathic remedies, but every one of the twelve tissue remedies are standard remedies in homeopathic therapeutics. I know the remedy natrum sulphuric. I use it in my practice, I have used it over the entire period of my practice, and I still do.

We do not prescribe for names; we prescribe for a condition; as we find a condition in the patient we prescribe for the patient. Natrum sulph is used, more than anything else in catarrhal conditions—nose, throat or stomach —particularly after flu. It is one of our most valuable remedies for post-catarrh. It certainly has therapeutic value, in my opinion.

Calcarea phos, that is, calcium phosphate, is a remedy used by me to quite a large extent. I have used it during the entire period of my practice. I use it in all ailments in young people with a tubercular tendency of a certain type—tall and dark and thin—. We use it in cases of nervous exhaustion and certain digestive troubles.

If you will explain to me what acidosis means, I will answer your question concerning the use of calcarea phos. I use it in certain conditions of acidosis. All of our salts of calcareas, of course, are alkalines. I suppose you mean

by acidosis that your acid is higher than it ought to be and your alkaline is conditionally lower than it ought to be. We never get an entirely acid condition, or we would not live three seconds. In anything where we have an acid condition, whether it is from heartburn to more serious troubles, all of our calcareas or lime salts are used in those conditions.

I have used these remedies in connection with troubles of the liver. If the condition of a patient shows that was the remedy that fitted his case, and the liver was affected, we would use it.

In certain types of rheumatism we use natrium and sodium salts.

With natrium I have seen almost miraculous cures of malaria, particularly after the Spanish War, when they sent a lot of chronic malarial patients, the type that couldn't be cured with quinine or anything else, and we cured them with natrum sulph and natrum muriatic, so in my experience I have seen cures of malaria with natrum sulph, quite a number of them.

I have prescribed it for those who complain of a condition that possibly comes from living in damp quarters or areas. Your natrum sulph patients are most always aggravated under conditions of moisture like near the sea shore or in foggy places or in rain.

When it fits the condition of the individual patient, it has some benefit in cases of asthma.

It certainly has a therapeutic value in all those ailments.

(Testimony of Dr. Hovey L. Shepperd)

I am familiar with the manner of preparation, most always by trituration. That is, by grinding it. It used to be done by the hand mortar, and some do it yet, but now most all of it is done by electrical driven mortars.

(The witness then described at some length the manner of the preparation of the products mentioned, his description being similar to that of the witness Craig whose testimony had previously been introduced regarding the manufacture of Mrs. Alberty's products Calcatine and Liver Cell Salts.)

The witness testified further as follows:

The standard tablets are one grain. Of course, we have higher dilutions. In those very weak dilutions they have a very small pellet that isn't must larger than a pin head and give any where from 10 to 50 at a time. I am familiar with the pellets put out by the Standard Homeopathic Pharmacy here. If prescribed properly, a dosage of as many as 4 or 5 a day taken at intervals, or often a larger number, would produce a therapeutic effect.

The witness was then asked:–

"Q And in the diseases mentioned, if two pellets were taken every 30 minutes for such period of time, would they be of any benefit in the conditions we talked about earlier in our examination?

"A Why, yes, but I wouldn't want to give them every 30 minutes, personally. Four times a day would be enough, three or four times a day.

"Q What I am getting at is, the smallness of the amount of calcium or natrum sulphuric, as the case may be, does that affect their efficiency?

"A Not a bit."

(Testimony of Dr. Hovey L. Shepperd)

The witness then went on to testify as follows:

The smallest effective dose has never been found because in the divisibility of matter, we find the infinite. We can not conceive of these things small. It used to be pure theory, but today with our new knowledge of physics and physiology, we find that the absorption in our system is in direct proportion to the effect of the drug. The more finely divided, the more surface. If you take an amount you will have so much surface, and if that amount is divided, you get that much more surface. So the same way with a drug when it is triturated with a known medical substance. Some of them run up to the hundred thousands which is, of course, just "pure moonshine", inconceivable, but I have seen that hundred thousandth natrum given in chronic cases of malaria and it does the work. Hahnemann, the German physician, first discovered why quinine was a cure for certain types of malaria. That led to his theory that like procures like. Schussler's theory that we needed only the twelve tissue remedies, that is the twelve metals found in the normal body, and given according to Hahnemann's dilution, has never been disproved. They are used constantly by homeopathic physicians within their range, but we use many more besides. Some of them we are using right along every day.

CROSS-EXAMINATION

We homeopaths prescribe for individuals and not for diseases, if that is what you wanted to know. There is no such thing as any particular drug for a disease—that is, no drug will cure every case of pneumonia or every case of typhoid. We examine the patient to determine his

(Testimony of Dr. Hovey L. Shepperd)

symptoms and pick out the particular homeopathic drug that fits closest to the conditions of the patient, both objective and subjective symptoms. Ten persons with colds might get ten different remedies. There is no one remedy that will cure every disease or any single disease. We prescribe a great deal on the symptoms entirely. We have patients 3000 miles away whom we treat very successfully, but we have to know their symptoms; have correspondence with them or from some other source get directly from them their particular symptoms.

Q. And it is not proper practice to prescribe without those symptoms being known to you, is it?

A. That wouldn't be an exact practice, no.

Q. Well, it would not be practice according to the tenets of homeopathy, would it?

A. No.

One drug might cure twenty different diseases. That is possible, yes.

Q. Possible, but one case in a thousand, isn't it?

A. Well, possibly more than that.

Q. Sir?

A. Possibly more than that, but it certainly is possible.

Q. It is possible maybe in one case in a thousand?

A. Yes.

The witness was then asked if he had ever prescribed for people without getting the patient's symptoms, and then went on to testify:—

Personally, we do not prescribe that way. Of course, there are books sent out for home practice. We find some of them—hundreds of families back in the country have

(Testimony of George P. Larrick)

these little homeopathic home books which give the symptoms for the drugs, and they pick them out. They are like "Humphrey's". I have forgotten the name that was used so much. A patient was in my office today who claimed she was cured of pneumonia by taking Humphrey's remedies. I don't know what she took, but this was a remedy that was for flu and similar conditions. The books I speak of set forth the symptoms. They have a description of the symptoms of the disease to fit the drug, too.

Thereupon,

GEORGE P. LARRICK,

who had theretofore testified on behalf of the Government, was called as a witness for the defense, and after being sworn, testified in substance as follows:

DIRECT EXAMINATION

I am an inspector in the Department of Food and Drug; I have with me a file and I perused the file, which is the entire file in the case. It was perused within recent weeks.

The witness thereupon was asked whether it contained all the correspondence between the Department and Mrs. Alberty prior to 1932. He stated he could not say whether it contained every piece of correspondence, but that he was familiar with the conditions of the dealing with Mrs. Alberty during the time prior to those mentioned in the information.

In answer to the question whether he could find a letter written to Mrs. Alberty prior to making the seizures under discussion where the Government had made any complaint about any of the labels charged against her,

(Testimony of George P. Larrick)

he stated the letters were produced on his former examination. Upon being further asked for letters referring to the labels prior to the seizure of the labels not prior to the date of the information, he examined the file and said, "I have a letter dated January 21, 1931." He thereupon stated it was a letter signed by F. J. Cullen, Acting Chief of the Drug Control, on the stationery of the United States Department of Agriculture, Federal Food and Drug Administration. He then testified as follows:

"Q It relates entirely to the booklet "Alberty's Food", is that correct?

"A The book entitled "Alberty's Foods", but it contains particular references to the medicine involved in this case that was testified to previously."

The witness continued:– The letter was intended to tell Mrs. Alberty that in the opinion of the medical staff of the Food and Drug Administration the claims made for Alberty's Calcatine, Alberty's Liver Cell Salts, and a long list of other medicines was false.

He was asked to read the letter, and thereupon read the letter which was dated January 21, 1932, and read as follows:

"This Administration is in receipt of the booklet "Alberty's Foods' and after carefully considering this book, we find that it is highly objectionable, containing many of the statements objected to in previous correspondence and interviews."

(Testimony of George P. Larrick)

The witness then said:– I have read a great deal of the previous correspondence. He was then asked:–

"Q Have you any letter in that correspondence which expressly objects to the label on Calcatine, on Liver Cell Salts or on Anti-Diabetic?"

A On August 4, 1928 a letter was addressed to Mrs. Alberty commenting on printed matter she had submitted. The letter was thereupon handed to counsel for the defense. The witness was asked if he would look the letter up and see if there was any reference to any of the remedies or products charged in the information against Mrs. Alberty as distinguished from "Alberty's Food". The witness thereupon stated: This letter contains this statement:–

"With reference to your request that the Administration blue-pencil the particular words in your printed matter which are regarded as objectionable, such a procedure is hardly practicable. The character of the wording is objectionable practically as a whole."

The witness then went on to say the material which had come to the Administration's attention did deal extensively with the "Foods", and the letter did pick out the "Food" in several instances for particular comment in saying that the booklet and printed matter were objectionable as a whole. They had previous reference to descriptions of Calcatine appearing on page 9 of the printed matter in this file. If you wish, I will be glad to read the particular statement about Calcatine that is involved in this matter wherein it states that her printed matter was objectionable as a whole. There is not a specific

(Testimony of George P. Larrick)

mention in the letter of Calcatine. The record clearly shows the reference, however, is the booklet. There is not any specific mention of Liver Cell Salts, but there is a reference to the booklet discussed in the letter, and both products are mentioned therein, so by reference to the booklet the claims made were objectionable. The Anti-Diabetic product was not upon the market at that time. There was reference to the labels in the letter because the booklet was part of the label at that time. She does not at the present time, but she shipped a booklet in the package of Alberty's Food. That is not the only product which carried a booklet. There were packages shipped in the same container where several products were combined and shipped together, and the booklet was involved in the shipping package. I don't know of my own knowledge of any such shipment. I am testifying from my recollection of the record, and I depend upon the record and my recollection of the entire case.

(It is well to mention at the present time that Mr. Larrick will later in his testimony correct the foregoing statement and will declare specifically there were no booklets in any of the products which Mrs. Alberty is here charged with misbranding, and that he was incorrect in that. Said correction was made voluntarily.)

Witness continued:– There is no mention in this one letter we have gone over by name of any of the products

she is charged with misbranding here. It is only by reference to the material she submitted—the booklets.

The witness was at this point again asked if there were any other letters prior to 1932 or 1933, either date, where there is any mention of misbranding Calcatine, Liver Cell Salts, Anti-Diabetic, or any of them, and the witness examined the documents in his file, and thereupon testified as follows:– On December 15, 1928, in a letter signed by C. W. Crawford, he again refers to the booklet as a whole.— "The booklet, however, is so full of statements regarded as unwarranted that it will be impracticable to attempt detailed comment." (Witness then goes into the first pages of the book, and continues):– There is no specific mention of Calcatine, Liver Cell Salts or Anti-Diabetic by name, except that it is incorporated in this letter by reference.

The court interrupted:

"THE COURT: The best thing we can do is to read the letter, I would think. That would tell whether there is specific mention or not.

"MR. KELLOGG: I thought I would save time, as it is a long letter.

"THE COURT: It doesn't seem to have that effect. How long is the letter?

"THE WITNESS: This letter is a page and a half.

"THE COURT: The only way to determine is to read the letter.

(Testimony of George P. Larrick)

"THE WITNESS (reading):

"Mrs. Adah Alberty,
"328 H. W. Hellman Building,
"Los Angeles, California.

"December 15, 1928.

"Dear Madam:

"The administration is in receipt of a report from its Los Angeles Office enclosing copies of the labels, wrappers and booklet for your Alberty's Food. We are informed that you desire to be notified of any portions of this labeling which are regarded as in conflict with the requirements of the Federal food and drugs act.

"The Administration has no adverse comment to offer to the label and wrapper of 'Alberty's Food for Infants'. Also with the exception of the legends underneath the pictures 'Below—Calcium Starved Prematurely Old', 'After—Calcium Balance Restored Robust Health', no comment will be made on the label and wrapper for 'Alberty's Food Adults and Children'.

"The booklet, however, is so full of statements which are regarded as unwarranted that it will not be practicable to attempt detailed comment. The statements on the front page to the effect that 'Alberty's Food makes of cow's milk a different food – – – more easily digested', that 'it breaks up the dense curd into – – – soft particles' etc. appear to be without foundation of fact. The statement on the second page that Alberty's Food is 'rich in minerals' also appears to be subject to criticism. The refer-

ence to the Beginner's Formula containing your food as a 'treatment' (page 3) may convey a misleading impression regarding the therapeutic efficacy of the article. Some of the statements under the heading 'Acid Fruits' and some of those under the heading 'Important' are in need of deletion or revision. On page 4 reference to 'Milk Cure' and the statement 'When the stomach is very weak' are capable of creating misleading impressions. The statement that 'Any ill effects of coffee or tea are offset when used in Alberty-Food' is without any foundation in fact. The statements regarding constipation are greatly overdrawn.

"The second paragraph on page 6 is subject to the criticism that in a great many diseases Alberty-Food would be of no help whatever. Alberty-Food can not be depended upon to assure the 'assimilation of the Calcium element'. The paragraph beginning 'The human race has practically lost the power of assimilating calcium' is unwarranted in its entirety. Reference to underweight or ceasing to gain weight, acidosis, diabetes, diarrhea, tuberculosis, nerve exhaustion, increasing weight, 'Calcium spells life, health and youth', references to very weak infants continuing the treatment 'until the child revives', references to indigestion, scurvy, rickets, eczema, diseases of malnutrition, thin, nervous, sickly, sleepless, cross babies, and numerous other statements in the literature including promises of benefit which the articles can not be depended upon to fulfill, and the pictures on pages 30 and 31, render necessary revision of the booklet practically as a whole.

"It is suggested that any references to your foods be limited to their properties as nutritious, easily digestible, easily prepared articles of diet, if their composition jus-

(Testimony of George P. Larrick)

tifies such description and that references to their use in the treatment of disease conditions be omitted since foods in general are not to be regarded as therapeutic agents.

Very truly yours,

(Signed) C. W. CRAWFORD,
Acting Chief."

Mr. Crawford, who signed the letter, is chief of the office of the Interstate Supervision of the Food and Drug Administration, and the assistant chief of the Administration. Dr. Cullen was the chief of one of our technical divisions. He is no longer with the service. In 1932 or 1933, I do not know the exact date, I was administratively designated to handle the drug division until a successor could be chosen. It was one and a half years before a successor was chosen. He was Dr. Durrett. Mr. Campbell is the chief of the whole Administration. He was a superior of Dr. Cullen—in fact, he was the superior of all of us.

The witness then went on to testify with reference to the letter to Griffith Jones mentioned the other day:— I believe it was dated August 15, 1934, over the signature of Mr. Campbell and was actually dictated by A. G. Murray and initialed by Dr. P. W. Spickard. I had nothing to do with the preparation of the letter myself. I did testify I had a conversation in September, 1934, with Mrs. Alberty. I suggested to her then that she go to Philadelphia. She had some homeopathic literature, and I suggested she consult some competent homeopathic physician there. I declined to name any one. I did not suggest Dr. Kebler. It is not our policy to do so. Dr.

(Testimony of George P. Larrick)

Kebler called me up and I displayed to him thereafter a copy of the letter which had been written in which we had come to the conclusion it was useless to work with Mrs. Alberty to help her revise her labels.

"THE COURT: Proceed."

Thereafter the witness went on and testified as follows: I did not state to Dr. Kebler in the words you used. I showed Dr. Kebler a copy of the letter sent to Mrs. Alberty by my chief. I told him if he wanted to know the Government's position about the claims on her products I would be glad to display to him an exact copy of the charges that had been drawn and had then issued and are now involved in this particular case. Dr. Kebler used to be in our Department. I had no direct statement that he represented Mrs. Alberty, but he came and presented her material.

Witness was then asked, "Now, as a matter of fact, Mr. Larrick, you know, do you not, that it has been primarily the booklets that were introduced here that the Department complained of before 1932?"

The witness then went on to state: Not at all. When someone comes to us for advice about a label, and we tell them that "tuberculosis" is objectionable, we don't say to remove the "tuberculosis" from this place of the booklet and this page of the booklet and this place on the label. We believe if we give them a general idea as to our opinion as to "tuberculosis", we have gone far enough, with sincere people really wanting to revise their booklets.

His attention was called to the fact that the question asked was if the complaint of the Department was not

(Testimony of George P. Larrick)

primarily Mrs. Alberty's booklets issued prior to 1933, and that the corrrespondence all related to booklets and not labels, and the witness went on to say: Not at all. It was about them both. I can state now from the record that when we told Mrs. Alberty she should delete claims of tuberculosis, she should have taken them out of the booklets and the labels, and you can not take the correspondence alone, when a person writes in one day and comes in the next month, you can't consider the correspondence alone and get the full picture. We keep a record of the interviews and the correspondence both.

The witness was asked to have the correspondence relative to the labels in court the following morning by defense counsel, and he answered as follows: "At that time the label was the booklet because it was in with the package."

His statement was asked to be stricken. It was not stricken from the records.

Witness went on to state: I have not personal information. I rely upon what somebody else told me in that connection. We wrote her about the booklet and the labels at that time. I will have here tomorrow any reference in either correspondence or the letters concerning the labels in the information—that is, Calcatine, Liver Cell Salts, Lebara or the Anti-Diabetic.

At this point the direct examination by the defense was interrupted until the morning, but in the interest of using the allotted time, cross-examination by government counsel proceeded.

(Testimony of George P. Larrick)

CROSS-EXAMINATION

"MR. PURDUE: Please read your reference to Calcatine in the booklet which was told her to be objectionable, and practically as a whole.

"MR. KELLOGG: Now, just a minute. That is objected to upon the ground it is incompetent, irrelevant and immaterial, no proper foundation laid and not within the issues of this case and is not proper cross examination.

"THE COURT: Counsel is referring to something that took place at the time upon which he was questioned. He was questioned about that on his direct examination. I think it is proper. The objection is overruled.

"MR. KELLOGG: May we note an exception?

"THE COURT: Yes."

Thereupon the witness read as follows:

"Alberty's Calcatine.

"Calcatine is of homeopathic origin, triturated with sugar of milk, which is a food instead of talcum powder which is non-assimilative. While Alberty's Foods supply the body with food, it is the Calcatine which helps to make up the existing deficiency as we are all calcium starved.

"Calcatine speeds up cell reproduction and the whole body feels the revitalizing effects. The recovery of health will be more rapid as Calcatine acts as a tonic supplying the blood cells.

"Calcium phos is essential at all times in life for the nutrition of the body. It is found in the blood plasma and

(Testimony of George P. Larrick)

corpuscles, saline or gastric juices, bones, connective tissue, teeth, etc. It is great importance to the tissue promoting cell growth making it of inestimable value to both young and old. It has a special chemical affinity for albumen which forms an organism supplying this salt in the tissue cells.

"It is a valuable remedy in anemia, tuberculosis, or chronic and wasting diseases, swollen glands, ulcers, headaches, too rapid decay of teeth, pimples, neuralgic rheumatism, prevents gallstones, acidosis, Bright's disease, goitre, pancreatic diseases, etc.

"Calcatine is not a medicine but a tissue and cell salts."

At the next session of court, Mr. Larrick resumed the stand, and at that time Mr. Purdue stated as follows:

"Mr. Larrick—do you wish to make a change in your testimony of yesterday afternoon, after examining the record?"

Mr. Larrick thereupon stated as follows:

"Yes. I stated in answer to a question it was my recollection that the Alberty booklet had been shipped in the same package with the Alberty medicines. In reviewing our records, I am unable to find any incident where the booklet was actually contained in the same package with the medicine. I am forced to the conclusion that my recollection in that particular was wrong and that the booklet was not shipped in the same packages with the medicines."

(Testimony of George P. Larrick)

RE-DIRECT EXAMINATION

The witness was then asked by Mr. Kellogg a question as follows:

"So that you now want to correct any impression you gave that any of these booklets that were introduced here over the defense objection were a part of the packages offered for sale?" to which the witness stated, "Yes; they are not a part of the packages."

The witness was then asked if he had any letter in his records or did he find any interview in his search of the record where the Department had specifically mentioned Calcatine, Liver Cell Salts, or any of the articles in question in the case, and the witness stated he had a letter dated October 28, 1929, signed by C. W. Crawford, where it refers to a paragraph on page 9 in a booklet. The witness did not disclose any letter specifically mentioning Calcatine or Liver Cell Salts, Labara, or Anti-Diabetic specifically by name prior to the year 1933.

The witness then went on to state: The first interview, however, of December 7, 1931, does refer specifically; and he read from a paragraph in the report of an interview with Mrs. Alberty on that date as follows:

"She submitted labels for Nerve Cell Salts and Liver Cell Salts and Calcium Tablets and requested criticism of these labels. She was informed that no specific comment could be offered regarding these labels without the working formulas. She stated that these preparations were homeopathic remedies, put out by homeopathic remedy companies, and that she did not have the formula and so far has not been able to obtain them.

(Testimony of George P. Larrick)

"Mrs. Alberty was informed that regardless of the composition it was the writer's opinion that certain statements on the proposed labels were extravagant. She indicated that she would attempt to secure the working formulas for each preparation and submit the labels together with the formula for comment."

The interview was over the signature of Dr. Spickard.

The witness referred next to an interview February 23, 1932, between Mrs. Alberty and Dr. F. K. Cullen of the Department, whose name had appeared in the evidence theretofore, and he read the following information contained in the report of that interview:–

Mrs. Alberty asked for comments on labels for her Nerve Cell Salts and Liver Cell Salts. She stated that she did not know the formulas for these preparations except they contained various types of phosphates. She was informed that definite criticism could not be given on the label without the knowledge of the formula, but that regardless of the formula, the statements contained in the labeling are very extravagent and that her Nerve Cell Salts would have no direct effect on nerve cells nor would they act as a brain food; that they would be of no particular benefit in nervousness.

She insisted that these preparations were the treatments for the disorders for which they were recommended.

Mrs. Alberty's attention was called to the statements on the label for Liver Salts, referring to 'malaria, biliousness and liver disorders', which are entirely too broad. She was also told that because of the reference to various disorders on the labeling of her preparations, if they

should be found in interstate commerce they would be subject to seizure and she would be liable to prosecution.

She was certain if a court case were instituted against her she would be able to produce sufficient evidence to win the case.

Some one had given her Dr. George W. Hoover's name, and when she left the office she said she intended to consult him as to the wording of her labels."

The witness then referred to a letter from C. W. Crawford dated April 16, 1932, and then stated as follows:– That letter refers to Mrs. Alberty's letter of February 24, 1932.

The witness then went on to say: The letter does not make a complete story unless you know what she wrote to us.

"MR. KELLOGG: I move that the answer be stricken as not responsive.

"THE COURT: No. I think that it is very pertinent. In fact, no letter is of account, if it is a reply to another letter, unless the inquiring letter is read. You had better produce it.

"MR. KELLOGG: I might point out that that is a convenience for cross examination, if I might, and also that the letter is not yet in evidence and it may speak for itself.

"THE COURT: You may be right. I am not sure that that is the rule, though, by any means, because it undoubtedly is within the discretion of the Court.

However, I have no objection to it. However, the witness states that the letter is not intelligible without the

(Testimony of George P. Larrick)

letter to which it is an answer. The court is going to take his word for it and permit him to read the original letter.

Read them in order, the inquiry first, if that is what you are saying."

"THE COURT: So we will not lose any time and thus we will get a better idea of the sequence of the two statements.

"MR. KELLOGG: I haven't, your Honor, been disposed to restrict the examination and I think that if this letter requires the other, I will be only too glad to have the inquiry read.

"THE COURT: Read the original letter."

Thereupon the witness read as follows:

"Washington, D. C.
"February 24 - '32.

"Dr. Cullen,
"Washington, D. C.

Dear Dr. Cullen:

"I called on Dr. George Hoover, he is surely a wonderful man and I liked him very much. He very kindly made some suggestions as to my labels Calcatine—Liver Cell and Nerve, which I am surely going to follow and I will send you some of the new ones as soon as I can get home and get them printed.

"Am changing the name of the Nerve and Liver Cell, so will you be kind enough to hold off on any action and give me a chance?

(Testimony of George P. Larrick)

"Of course, there are bottles of these products out, but I will destroy all my remaining labels at my office, as soon as it is possible to get new ones printed.

"Very sincerely and with all good wishes,

"Adah Alberty."

The witness then read the reply as follows:

"Mrs. Adah Alberty,
"729 Seward Street
"Hollywood, California.

"Dear Madam: April 16, 1932

"On February 24, 1932, you addressed a letter to Dr. Cullen in regard to certain of your medicinal products, stating you were going to effect a revision of labels and that copies of the revised ones would be submitted to the Administration as soon as you could get them printed. Will you please advise us promptly whether new labels have been put into effect, and, if so, furnish us with copies.

"Very truly yours,

"C. W. Crawford, Acting Chief."

The witness re-read the letter of Mrs. Alberty to Dr. Cullen dated April 14, 1932, which he had read earlier in his testimony.

He next read the reply of Dr. Cullen dated April 23, 1932. It was addressed to the defendant, and the body of the letter read as follows:

(Testimony of George P. Larrick)

"Dear Mrs. Alberty:

"The Administration is in receipt of your letter of April 14th enclosing proposed revised labels for your products 'Alberty's Organic Phosphate Pellets', 'Alberty's Lebara Organic Pellets', and 'Alberty's Calcatine'.

"We wish to call your attention to our letter of April 16th.

"Since you have not submitted to the Administration the complete working formulae for your various products, detailed criticism can not be offered. However, regardless of the composition, statements on those labels referring to the preparations as 'essential in composition of nervous tissue', 'aids acidosis, teeth, bones, etc.,', 'aids acidosis, dormant liver, clearing the complexion', are considered highly objectionable."

The witness was then referred to his conversation with Mrs. Alberty in 1934 concerning which he had testified for the Government, and was asked if, toward the conclusion of that conversation, he did not say to Mrs. Alberty that he believed she had better get out of the medicine business and go back to California and go into the cosmetic business, to which the witness answered; I did not say just that. I suggested to Mrs. Alberty that she had a food which was—that could be perfectly properly marketed, and that my advice to her, when she asked my advice—and it was a very pleasant conversation we had—was that she didn't have the scientific information

(Testimony of W. G. Vanderbruggen)

or the medical knowledge that is necessary to tell sick people what to take. I did suggest to Mrs. Alberty that the thing for her to do was not to stay in the medicine business. I believed there was some discussion about her interest in cosmetics and I told her it might be a good line of business for her to pursue.

The next witness called for the defense was

W. G. VANDERBRUGGEN,

who being first duly sworn, testified in substance and materially as follows:

DIRECT EXAMINATION

I have a boy named Jacob Vanderbruggen who is 20 years old. I am familiar with Alberty Food products. I believe I have seen Mrs. Alberty's booklet "Calcium, The Staff of Life". I have seen the pictures of my boy in there (referring to page 16 of the booklet). The witness stated: The picture taken at eighteen months of age does a little credit to his appearance. It was worse than it shows in the picture. The picture ten months later is a fair picture of the boy. During that period he took nothing else but Alberty's Baby Food, except maybe some water or some orange juice. The baby had been under the care of about 20 different doctors prior to going on Alberty's Foods.

There was no cross-examination.

(Testimony of Alfred H. Nickel)

The next witness for the defense was

ALFRED H. NICKEL,

who being first duly sworn, testified in substance and materially, as follows:

I live in Los Angeles at 532 Oleander Drive. I have a son fifteen years old, Frank Nickel. I recall when he was eight months old. At that time he weighed approximately four pounds less than when he was born. I had done everything I could to bring the baby through. The doctors had given him up. At that time he was at the Childrens Hospital and they told me there was nothing to do but take him home. He is still living. I attribute his recovery to having given him Mrs. Alberty's products. I believe I have seen the exhibit "Calcium, The Staff of Life". The pictures on page 59 are two pictures of my son, the first one before he took the food and the second one afterwards. They are a fair depiction of his appearance. They were taken with my knowledge and consent. Mrs. Alberty prepared a diet for him and we followed it.

The witness was then asked the appearance of his boy's skin before he started on the treatment. The court interrupted and stated:

"THE COURT: Just a moment, please. I didn't understand that we were going into any medical inquiry here.

"MR. KELLOGG: No, your Honor.

"THE COURT: This is directed to the justification for the pictures, the belief on the part of the defendant that the picture expresses, correctly expresses the situation. That is my understanding of the purport of the evidence. Beyond that I don't think the witness should go."

(Testimony of Alfred H. Nickel)

Counsel for the defense stated to the court that he was not going into any medical testimony, but wanted the witness to state the surface appearance of the boy, which would not show in the picture to support a statement below the picture.

The court replied that if it did not show in the picture it was not relevant or material, in the court's view. The witness then stated the doctors had told him it was a malnutrition case. They told him the boy had rickets.

Mr. Purdue moved to strike that testimony as hearsay.

The court ordered the answer stricken as hearsay.

CROSS-EXAMINATION

On cross-examination the witness was asked if he had been paid by Mrs. Alberty for inserting the picture and he replied he believed he paid for the picture himself—he did not remember.

Thereupon he was asked if the child had taken Alberty's Calcatine, to his knowledge,—a drug. The witness asked what that was, and the question was repeated. He then stated as follows:

"A Well, now, you are rather putting me on the spot for this reason. I didn't—

THE COURT (Interrupting) A moment, please, Mr. Witness.

The Court isn't concerned whether anybody is put on the spot or not, whatever that expression may mean. You are asked the direct question as to whether or not this child ever took a certain thing. Now, answer that directly.

(Testimony of Alfred H. Nickel)

"THE WITNESS: Well, your Honor, here is the situation.

"THE COURT: No matter what the situation is. Do you understand the question?

"THE WITNESS: Yes, but suppose I don't remember the name of that tablet?

"THE COURT: Wait a moment. Read the question, Mr. Reporter.

(The pending question was read by the reporter, as follows:

'Q Did your child take any Alberty's Calcatine?')

"THE COURT: Now, do you know what "Calcatine" is?

"THE WITNESS: I didn't know it was a drug.

"THE COURT: Do you know what it is?

"THE WITNESS: No. What is it?

"THE COURT: The witness doesn't understand now what it is. I fail to see tha*n* an answer can be given to the question."

The witness was then turned over for re-direct examination.

RE-DIRECT EXAMINATION

The witness stated on re-direct examination that he knew Mrs. Alberty; that she furnished him with some tablets or pellets, but he did not remember the name.

(Testimony of Mrs. Ethlyn Vorhis)

MRS. ETHLYN VORHIS

was the next witness called on behalf of the defendant, and being first duly sworn, she testified substantially and materially as follows:

I am the wife of Don Vorhis and the mother of Leonard Vorhis. Leonard is 19 years old. I recall him when six months old. He weighed six pounds. He had had medical care and attention at that time. The doctors told me what was wrong with him and how they could correct it.

Counsel for the defense then asked the witness, "They told you that unless an operation was performed, he would die?"

"MR. PURDUE: I object to the question as calling for hearsay testimony, your Honor."

The objection was sustained.

Counsel then referred to Exhibit 10, pages 62 and 63, and showed the witness a picture on page 62 and asked if it was recognized. The witness then stated: I do. It is a picture of my baby Leonard when he was six months old. He appeared that way at that time. She was shown a picture on page 63 of the same exhibit, and she stated that was a picture taken about four months later and that it was a fair picture of his appearance at that time. She stated the boy was in the court room with her. That a week or so prior to the trial of this case a gentleman called upon her and stated he was from the United States Government Bureau of Investigation, and wanted to know if her baby had taken any of Mrs. Alberty's tablets or any kind of medicine or drugs. I told him the baby had

(Testimony of Dr. William J. Geirman)

not. He asked if the baby had taken any of her products and I told him he had taken Mrs. Alberty's "Food". I attributed his recovery to the taking of her products, and so stated to Mrs. Alberty at the time the pictures were taken.

CROSS-EXAMINATION

The witness was asked if her baby had taken any of Alberty's Calcatine or Liver Cell Salts or Anti-Diabetic Vegetable Compound, and answered it had not.

The next witness called on behalf of the defendant was

DR. WILLIAM J. GEIRMAN,

who being first duly sworn, testified substantially and materially as follows:

I am a physician and have practiced medicine for 45 years; in California for 26 years. I have a sanitarium in Altadena.

He was then asked if he used Alberty's foods in his sanitarium. He answered "Yes."

Mr. Purdue then objected to the question as incompetent, irrelevant and immaterial and not within the issues, that it was "Alberty's Foods".

The objection was sustained."

The witness was then asked if he had used any of the pellets and answered, "I have not. I use only the powdered food."

The witness went on and stated: I had a patient by the name of Albert Smith. He had tuberculosis and a cavity in his right lung. He is living today. I treated him. I used the Alberty's Food.

No cross-examination.

(Testimony of Mrs. Genevieve Reynolds)

The next witness called on behalf of the defendant was

MRS. GENEVIEVE REYNOLDS,

who being duly sworn, testified substantially and materially as follows:

I live in Inglewood at 1230 Flower Street. I know the product Calcatine. I have taken it. I took it for a general run-down system, liver trouble, and anemia. I was very ill. They told me I looked like a pumpkin. I do not know quite how long it was I took it—several months. My general health was improved very much. I attributed the improvement in my anemic condition, all of it, to that. I have taken Liver Cell Salts. I took it with Calcatine. I did not understand they were a drug or medicine. I considered them a food. I gave the baby food to my father and also gave him the spleen tablets.

CROSS-EXAMINATION

On cross examination, the witness testified: I had liver trouble and anemia and was in a nervous run-down condition about two years ago. I was living in Inglewood then. I did not have a physician. I was under a chiropractor's treatment. His name was Dr. Johnson, I believe C. I. Johnson, the only one on Queen Street in Inglewood. I told him I had been bothered with my liver. I do not remember whether he told me that or not. I knew I had it. I remember we discussed my case and I told him I was going to take Alberty's Foods and he said he had heard it was very good. I did not have another physician before Dr. Johnson. I knew I had liver trouble the way I felt. My mother had had it for many years. She had been under a physician's care for 50 years.

(Testimony of Miss Helen Mikkone—Mrs. Hazel Reynolds)

The witness was then asked if she got "perfectly well after taking Calcatine and the other Alberty remedies". The witness went on to say: I consider myself in fairly good health. At that time I was unable to do my work, now I do all my work. I saw an improvement after a few weeks, and I kept on taking it quite a few months.

RE-DIRECT EXAMINATION

On re-direct examination, the witness stated: I certainly knew how I felt all right. I didn't need a doctor to tell me. I know how I feel now, too.

The next witness called on behalf of the defendant was

MISS HELEN MIKKONE,

who being duly sworn, testified substantially and materially as follows:

I am a nurse. I received my training in Russia. Am not a registered nurse in California. I have done nursing in San Francisco. I have used Alberty's Food. I have not used the pellets.

The next witness called on behalf of the defendant was

MRS. HAZEL REYNOLDS,

who being duly sworn, testified substantially and materially as follows:

I have used Mrs. Alberty's products with very fine results. I was ill when I commenced using the spleen and iron tablets and the food.

Thereupon the witness was asked, "You used both. Did they improve your health, in your opinion?"

(Testimony of Francis Oliver—Granvill Clarkson Bemis)

Mr. Purdue objected to the testimony as being immaterial as it concerned two foods not in issue in the case.

The objection was sustained.

No cross-examination.

The next witness called on behalf of the defendant was

FRANCIS OLIVER,

who being duly sworn, testified substantially and materially as follows:

I am a fireman in Los Angeles and have been for 14 years. I was seriously ill with duodenal ulcers. I had a physician who told me that about four years ago. I took Alberty products. I did not take the pellets. I took Alberty's Foods.

No cross-examination.

Mr. Purdue moved the witness' testimony be stricken as wholly immaterial to the case.

The motion was granted.

The next witness called on behalf of the defendant was

GRANVILL CLARKSON BEMIS,

who being duly sworn, testified substantially and materially as follows:

I am a fireman in Captain Oliver's department. I was ill six years ago, was in a generally run-down condition, never could find out my main trouble. I was thin, weighed about 148 pounds, always had a cold, never could gain, and had canker sores. I consulted physicians. They had several ailments wrong with me. I was supposed to have

(Testimony of Iona Burgess Armor)

an acid condition with high blood pressure, and then they said I had an alkaline condition. They never did really determine the actual trouble. I used Alberty products. I did not use any of the pellets. I used the Alberty's Food.

CROSS-EXAMINATION

The physician I consulted was Ross-Loos Clinic at the corner of Valencia and Wilshire—the Wilshire Medical Clinic. I consulted them from 1929 until the first part of this year. I was down there on an average of twice a month. I started using Alberty products in January of this year. I used the Alberty Food. Yes, I was well at times and at times I was not well enough during all the period mentioned to continue my duties on the department.

At the conclusion of the witness' testimony on cross-examination, Mr. Purdue moved that his testimony be stricken on the same grounds heretofore advanced—counsel thought he was talking about Calcatine and it appeared he was talking about Alberty's Foods.

The court granted the motion.

The next witness called on behalf of the defendant was

IONA BURGESS ARMOR

who being duly sworn, testified substantially and materially as follows:

DIRECT EXAMINATION

I live in Arizona, on the desert, where I have lived for four years. Part of that time I lived in Los Angeles and Santa Monica. I have had a serious illness in the last

(Testimony of Iona Burgess Armor)

eight or ten years. The beginning began a little—of course I cannot say—yes, I can tell you—within the last ten years. May I lead up to it a little?

As a child I was weak, had pneumonia, and I lived up in Long Island a while, and I got malaria.

"THE COURT: Just a moment, please. Counsel, bring this down to some immediate time.

"MR. KELLOGG: I am going to, your Honor.

"THE COURT: Well, do it now.

BY MR. KELLOGG:

"Q How long did this malaria continue?

"A For some time. Then, I had dandy Fever and didn't seem to get over it, just run down.

"Q That continued until when, Mrs. Armor?

"A Well, I was in a run-down condition until about 1925 when I was here in Los Angeles and—

"THE COURT (Interrupting) Strike out all testimony before 1925. Please obey the Court's instruction.

"MR. KELLOGG: I am, your Honor.

"THE COURT: I decline to accept your statement. It seems you are not. I am not questioning your intentions at all, but bring the witness down to something relevant, that is to say, her condition immediately. Now, make the witness understand that. She is your witness. Otherwise, the Court will have to order her off the witness stand.

"MR. KELLOGG: A*LL* right."

(Testimony of Iona Burgess Armor)

The witness then went on to testify as follows: I have used Mrs. Alberty's pellets, the phosphate and the Calcatine and the Spleen-A-Tone and the Liver Cell Salts. My condition was very bad when I commenced using them. I was weak, could hardly sit up. I went down to see Mrs. Alberty after reading an ad in the paper. I took one small can of Alberty's Food. Was hardly able to go down, hardly able to make it, but in two weeks I gained two pounds and felt different; felt stronger. Yes, I got beneficent results from using the different pellet preparations. I seemed to get strength, felt like a new person, different in every way. Prior to commencing the use of the pellets, I had a physician. He did not improve my condition with his treatment. I feel different altogether since using the products. I gained about 14 pounds. My weight was 113, maybe, or not quite 100 pounds. I wasn't weighing 100 pounds.

(Counsel referred to page 40 of Government Exhibit No. 10, showing the two pictures, one at the top and one at the bottom of the page, to the witness and asked if she recognized them."

The witness said: The top picture is of me and a very good representation of me before commencing to take the treatment. The picture at the bottom of the page is of me after I took the treatment. The last picture was taken in 1925 or 1926. It was quite a long time ago, just a few months after I had the first one.

The witness went on to testify as follows: I felt so much better after two weeks, I went down to the Broadway and met a lady demonstrating the Alberty Foods and I told her—

(Testimony of Iona Burgess Armor)

"MR. PURDUE (Interrupting) I object to that conversation.

"THE COURT: The inquiries in the first place, the assertions under which the picture was taken are certainly not important."

CROSS-EXAMINATION

On cross-examination, the witness stated as follows: I had a Los Angeles doctor just prior to the time of taking the Food in 1925. I do not remember his initials. His name was Dr. Wood. He was in the Chapman Building. He moved out to 48th St., southwest some place. I have known Mrs. Alberty since 1925. I think highly of her.

At this point the witness was asked if she received compensation for the statement she had made, and replied that Mrs. Alberty did not solicit it at all. She was then asked the following question:—

"Q That is not the question. Did you receive compensation?"

"A She gave me $50.00 after I had this picture taken.

"Q $50—She gave you $50 for the statement?

"A For the picture."

The witness then stated: I did not help her prepare the statement. I went down to offer this testimonial free of charge to Mrs. Alberty. I felt like I would like to let people know how much good it had done me. I was there and she asked me if I would have my picture taken. I didn't know whether I wanted to do that or not. She and I together prepared the statement.

The witness was then asked why she did not talk about the Calcatine and the Liver Cell Salts, if she took those,

and asked where she referred to either Calcatine or Liver Cell Salts in the statement.

The witness stated it was not in there, but she took them just the same.

At the conclusion of the testimony of this witness, counsel for the defense made the following statement to the court:

"MR. KELLOGG: At this time, your Honor, before calling the next witness, may I have an exception noted to the testimony stricken of Captain Oliver and the witnesses whose testimony was stricken just before the recess by the Court, on the ground that they didn't use the other food?

"THE COURT: That was the testimony just confined to the food?

"MR. KELLOGG: Yes.

"THE COURT: Yes, you may have an exception."

The next witness called on behalf of the defendant was the defendant,

MRS. ADAH ALBERTY,

who being duly sworn, testified substantially and materially as follows:

DIRECT EXAMINATION

On direct examination, the witness stated as follows: I have never had any training as a doctor nor in the law, but when a girl I did have training at St. Luke's Hospital in Denver as a nurse; was there just long enough that I was to go into the operating room the morning after I left. After that I was a special nurse as I did not graduate from the Hospital. I went out as a maternity nurse

(Testimony of Mrs. Adah Alberty)

and for sick children. It was so long ago I have forgotten the number of years. I have seven children of my own. I started in manufacturing my products after my first bottle baby died of malnutrition. My second baby was given up to die, and in the meantime, between the death of the first and the one given up to die, I had taken up the study of infants' feeding. I got all the books on infant feeding I could find. I sent to Washington, D. C. and got all the pamphlets they had ever issued. I had a lot of experience being a nurse on infant cases. All this was a number of years ago at Canyon City, Colorado. My first product was used on my son, Louis Alberty. He was the one who survived following the one that died. Thereafter, in Seattle, Washington, I started manufacturing my products commercially. Dr. McCauley of North Yakima, Washington, gave a child up to die, and my mother knew its mother, so the woman was induced to bring the child to me, in a dying condition. She brought the baby to me at my home. Every morning she brought the baby to me and took it away in the evening. In the first week the baby gained 2½ pounds. She stayed with me about a month and when the mother left she came to me—(at this point the defendant broke down and stated she could not talk any more about the babies).

After that, I went to the Seattle Star and told the editor I had a food that would save babies' lives, so he gave me a write-up five inches long to tell about it. From that I received 25 babies to care for. All had been under a physician's care, every one given up to die, in the last stages of malnutrition. I was able to save all but one. I wrote the history of each baby, with the doctor's name, what the doctor said, and also the telephone number.

(Testimony of Mrs. Adah Alberty)

Then I went down to see Joseph Blethen, editor of the Seattle Times. I gave him the list and told him, "I would like for him to give me a write-up" because I really was interested in saving babies' lives. He called me two days later and told me to come down, he wanted to talk to me. He was not very courteous—in fact, very abrupt. He told me he had investigated every testimonial; that he and his stenographer had spent the day before that calling the people up; he asked me what I wanted, and I told him I wanted a little write-up. He gave me that and refused pay.

Thereafter I took my formulas to various doctors in Seattle and asked if they would prescribe it. They refused, so I told them I would have to go to the laity because I felt it was my work in life to help sick babies. Joseph Blethen gave me all the advertising I wanted without charge. I took care of babies in my home sent to me by various doctors. Some had brain fever, almost everything you could think of—rickets and indigestion and eczema and everything else. Finally I had 150 babies under my care at one time, mothers calling me all hours of the day and night. I got so I couldn't stand it. I left and came to California, doing that two or three times, finally opening an office in the Pioneer Building in Seattle. Thereafter I came to California in 1920. I gave these babies some of them Dr. Russell's food, some of them Alberty's Food. Some I gave a form of hypo-phosphates. Before coming to me some of the babies had tried everything, even mother's milk, but none of them left me that couldn't assimilate and take care of and digest milk. I offered $100 for every baby who never gained an ounce the first 24 hours on Alberty's Food.

(Testimony of Mrs. Adah Alberty)

Between 1921 and 1923, somewhere, I started putting out Calcatine, Liver Cell Salts and remedies here under discussion. I tried them on babies and adults by giving them away before I commenced selling them. I checked up to see what the results were or I would not have put the products on the market.

I made a study of the Materia Medica of the Homeopathic School of Medicine for years.

(Witness was shown Boericke's Materia Medica, marked Exhibit E for identification).

Witness stated: That is my book. I brought it to court. I read part of this, but I have studied all of the 12 tissue cell salt remedies. I have read books on biochemistry. I have tried all the tissue cell salts.

(The book was offered in evidence as Defendant's Exhibit E, and was marked and received in evidence."

Reference was had to page 152 of the book and counsel read from that page as follows:

"Calcarea Phosphorica (Phosphate of Lime).

"One of the most important tissue remedies, and while it has many symptoms in common with Calcarea carb.,"—

I presume that is Calcarea Carbonate—

"there are some differences and characteristic features of its own. It is especially indicated in tardy dentition and troubles incident to that period, bone disease, non-union of fractured bones, and the anemias after acute diseases and chronic wasting diseases."

Counsel continued to read from the same exhibit the succeeding pages at great length.

(Testimony of Mrs. Adah Alberty)

Counsel also read from page 466 of the same Exhibit "E".

Counsel then offered Exhibits D, F, G, H, I and J in evidence and they were received in evidence and so marked.

The witness stated I am familiar with all these exhibits; I have either studied or read them, or parts of them, in particular concerning calcarea-phos and natrum sulph, and about the deterioration of the human race because of lack of calcium. I have read some of the book entitled "The New *Diatetics,*" by John Harvey Kellogg". It bears out statements I made in my literature of which he is an authority. I have read the book "Ultra Violet Light and Vitamin D in Nutrition" by Catherine Blunt, President of Connecticut College, former Chairman of the Department of Home Economics, the University of Chicago, and Ruth Cowan, instructor in Home Economics, the University of Chicago; the book deals with the experimental use of calcium and especially vitamin D.

I purchased my Calcatine from the homepathic pharmacy; I ordered what is known by them as calcarea-phos. The Liver Cell Salts is natrum sulph; that was ordered from them. I got the product that I marketed under the name of "Anti-diabetic" from Mr. Sims and it is a vegetable concentrate; I started purchasing that in 1932.

(The witness then testified to numerous conversations with employees of the Department of Food and Drugs regarding her booklet; that the only statements made about labels were that they were extravagent, and that she would have to change the name of "Spleen-A-Tone".) I never wrapped any booklet or pamphlet around any of

(Testimony of Mrs. Adah Alberty)

the articles Calcatine, Liver Cell Salts, Lebara or Anti-Diabetic. (The witness related a number of conversations with Dr. Cullen. She related her conversations with Dr. Hoover and stated he had suggested changes in her labels with which suggestions she had complied.)

Mrs. Alberty was shown Defendant's Exhibit A-1 and stated that was the first label she had used, the one that she was using when she went to Dr. Hoover. She was shown Exhibit A-2 and stated it was the label prepared after her visit to Dr. Hoover who had suggested revision of some of the claims on the original Calcatine label, viz., for constitutional disorders and uses.

She then went on to say: I wrote some of the words down in his office and prepared the second label as a result. He said I could use "aids" and that word was substituted for "uses." I deleted other things from the first label. I abandoned the first one in 1932 as soon as I came home in the Spring. That is the label referred to in the first count bearing the word "uses" and "Chief remedy for the growing organism and for correcting constitutional defects. Prior to the time of the seizure of the articles mentioned in the first count I had made arrangements, having gone to Philadelphia to Mr. Fry who had charge of my stock there and told him I was sending some stock with new labels on.

At this point Government counsel interrupted and objected upon the ground the conversation was hearsay and immaterial. The objection was sustained.

The witness then testified as follows: The goods in Count 1 were found on the 5th Floor of Thomas Martindales. The goods for sale were on display downstairs. I ordered these goods returned to me, and I have in my

(Testimony of Mrs. Adah Alberty)

file here a document from Mantindale regarding relabeling, together with the cost of relabeling. The letter states that they didn't understand why the old stock wasn't returned to me as ordered.

The document was offered in evidence. Mr. Purdue objected on the ground it was hearsay. The objection was sustained.

The witness then went on referring to the Defendant's Exhibit A-3 and referred to that label as one approved by Dr. Cullen when her goods were released under Government supervision in 1933, only to be seized again in 1934. That label read, "Calcium elements combined in an organic form. Indicated condition and conditions growing out of lack of calcium in system." It is another Calcatine label. The second label, or Exhibit A-2 is the one charged in the second count of the indictment, or the second Calcatine label, the one showing, "Aids Acidosis."

Thereafter I revised the label on that product again, changing the name to Ca-Mo. That was after the conversation had with Mr. Larrick in 1934.

I sent a sample of the label revised, after my visit to Dr. Hoover, to Dr. Cullen. Personally I received no protest from the Government against that label. I never received the letter sent to me after that because I was away.

The label at the bottom of the sheet containing the Exhibits A-1, A-2 and A-3, etc., is Alberty's Nerve Food Pellets showing the change made after my talk with Dr. Hoover to Alberty's Organic Phosphate Pellets, using the language suggested.

(Testimony of Mrs. Adah Alberty)

(The exhibits were offered and received in evidence as *Exhibit* A-1, A-2, A-3, A-4 and A-5. The second sheet, Exhibit B, was offered as B-1 and B-2 for the reason that there was pen and ink writing on the sheets.)

Referring to Exhibit B the witness went on to say: I used that label, Exhibit B-1, first. It was copied after the one used by the homeopathic pharmacy. The second one is the one used after I talked to Dr. Hoover. It is B-2 and says, "Alberty's Lebara Organic Pellets." I wrote down suggestions from him word for word and the labels prepared from it. I believe I had "Uric Acid" and "diathesis", "biliousness and malarial disorders" on the labels, and he said I could not use them, so they were deleted.

(Defendant's *Exhibit* B-1 and B-2 were offered and received in evidence.)

Before I prepared the third label, A-3, I consulted Elton J. Buckley, an attorney in Philadelphia and had a conversation with Dr. Cullen. He prepared the label for me after he talked to Dr. Cullen, sending me a copy. I never saw Dr. Cullen after that time, and he left the Department in 1933 or 1934.

The third label, Exhibit A-3, was placed on the bottle when relabeled under Government supervision, and says, "Calcium elements combined in an organic form. Indicated condition, and conditions growing out of lack of calcium in the system." Nevertheless these same bottles were again seized in 1934.

My attorney, Elton J. Buckley, asked for an injunction against the Government in Washington as the result of

(Testimony of Mrs. Adah Alberty)

the two seizures. At the last seizure they finally objected to the name, Calcatine, or to putting my product on the market at all saying it had no value and that no label would be satisfactory. My attorney asked for an injunction against the Government contending it was a difference of opinion between allopaths and homeopaths, and that as a recognized homeopathic remedy its sale could not be prevented.

At that point Mr. Purdue objected on the ground the testimony seemed to be hearsay. The objection was sustained. The entire statement was stricken out, the Court stating, "It is obviously entirely incompetent."

The witness then went on to testify as follows: I was served with notice of what the Court said, and I had a conversation with Mr. Larrick about it. The Court said I could sell the product, but made the suggestion I change the name Calcatine, which I did, calling it Ca-Mo. I had discontinued using the label, Alberty's Liver Cell Salts prior to the seizure of the food bearing a similar label as charged in the information. The goods were on the 5th floor of Thomas Martindale in my storeroom at the time of seizure.

The one right below that, or Exhibit B-2, is "Lebara." I commenced using that label after I talked to Dr. Cullen in 1932. It was prepared after my visit to Dr. Hoover. He said I couldn't use Liver Cell Salts. He made other suggestions about changes which I thereafter incorporated in the label. I wrote the suggestions he gave me down and followed them exactly.

Below on the defendant's Exhibit is a third label entitled, "Alberty's Lebara Pellets," which I commenced

(Testimony of Mrs. Adah Alberty)

using in 1934. I better strike that out. I believe I used this at the time of seizure.

I changed the label after the goods were seized. I wish to correct my testimony at this point regarding the label. The label was the one Dr. Cullen told Mr. Buckley I could use. That there was nothing claimed against it at all. That was the Lebara Pellet label which had been released by the Government.

I purchased Calcatine and Liver Cell Salts from Mr. Hyland and bottled them myself and sold them under my own label.

(The page referred to was introduced in evidence as defendant's Exhibit K and was so received and marked.)

The witness then went on to testify: When in Washington I saw Dr. Cullen of the Department three times and talked to Mr. Crawford only once. I also talked to Mr. Larrick, Dr. Durrett and others. I never had any conversation with Dr. Cullen to speak of on the labels. It was all about my book of directions, which was part of the label on Alberty's Foods. Dr. Cullen was concerned and so was I with the revision of that booklet. There is no charge of violation in this information relating to Alberty's Foods, or of any of the literature and labels.

About my labels, I was told at the Department that it was against their policy to suggest changes, that they could only criticize and had to know the formulas to do that.

I engaged Dr. Kebler in 1933 obtaining his name from Dr. Hoover to assist me in my revision. Dr. Kebler formerly worked at the Department. After a conversation with Mr. Larrick I also consulted with Dr. Kebler. I

(Testimony of Mrs. Adah Alberty)

went to him for the two booklets of directions, one with Alberty's Foods, and another. My attorney, Elton J. Buckley, was handling the revision of the labels.

When I got the letter addressed to my attorney, Griffith Jones, from the Department, I took an airplane and went to Philadelphia and on to Washington to see Mr. Campbell, but was referred to Mr. Larrick. He told me at that time he didn't believe I was acting in good faith. I told him I couldn't understand that. We had a long conversation in part about the criminal charges being filed here at that time, and at his recommendation I went to Philadelphia to see Drs. Young and Plummer, homeopathic physicians.

The defendant was shown Defendant's Exhibit C for identification and asked when she had first seen it. She stated: I believe it was '33—No, I don't remember. I received a letter from a Mrs. Thomas McCuenin. Thereafter when I saw these pictures (Defendant's Exhibit C) I wrote and asked if she would send me a letter telling me the baby's condition and let me use the pictures in a testimonial. The witness was shown a further letter, Defendant's Exhibit L for identification, and stated: I received this letter as a result of the one I wrote.

The letter was offered in evidence.

"MR. PURDUE: I object to their introduction, your Honor, upon the ground that the letter shows on its face it is dated in 1935, so it has no bearing upon this case."

"THE COURT: That is the only ground of your objection?"

(Testimony of Mrs. Adah Alberty)

"MR. PURDUE: And upon the further ground that no proper foundation has been laid and it is incompetent, irrelevant and immaterial, and it is not shown to pertain to Alberty's Calcatine, Liver Cell Salts, or one of the other remedies for which the lady is being prosecuted."

"MR. KELLOGG: May I be heard?"

"THE COURT: No, not yet. Is that the only objection?"

"MR. PURDUE: And on the ground that it is—yes, your Honor, upon the ground that it is after the time mentioned in the indictment."

"THE COURT: My understanding is that the only way writings can be introduced are through depositions and the law specifically permits the introduction of them. One person, totally disconnected from the case, might write somebody something, but I am not aware of any rule permitting that. I will be glad to hear you on that subject."

"MR. KELLOGG: I am only offering the letter, your Honor, in connection with the pictures as substantiating Mrs. Alberty's belief that she was justified in using them."

"THE COURT: That would not render them admissible and change the rule.

"The objection is sustained."

"MR. KELLOGG: May I have them marked for identification?"

"THE CLERK: L for identification."

(The documents referred to were received and marked "Defendant's Exhibit L for identification.")

(Testimony of Mrs. Adah Alberty)

"MR. KELLOGG: Now, your Honor, it may save considerable time and examination if your Honor will disclose, without the necessity of first offering each of these testimonials to Mrs. Alberty, whether or not your Honor would apply the same ruling. I have here letters, testimonials regarding the products, and if your Honor will rule, then I may make an offer of proof as to those letters and have them ruled upon.

"MR. PURDUE: I may say, your Honor, that I interpose no objection to letters which were received by the witness at or prior to the times mentioned in the indictment, and also which pertain to the product "Calcatine."

"MR. KELLOGG: I might point out there, Mr. Purdue—

"THE COURT (Interrupting) Very well, if the Government makes no objection, the Court certainly doesn't."

"Does it come within the times mentioned?"

"MR. KELLOGG: This is December 5, 1932."

"THE COURT: I am asking you."

"MR. KELLOGG: It is my understanding that it is prior to the seizure."

"THE COURT: Mr. Purdue will answer. Look at it and see whether you have any objection to it."

"MR. PURDUE (examining document) I object to the letter dated July, 1933, as being after the times mentioned in the indictment."

MR. KELLOGG: Might I point out, Mr. Purdue, both letters are from the same individual.

MR. PURDUE: We are only concerned about the times mentioned in the indictment.

THE COURT: There is an objection?

(Testimony of Mrs. Adah Alberty)

MR. PURDUE: If the defendant testifies she received the letter dated December 5, 1932, I have no objection to its introduction.

THE COURT: Very well.

There is no objection on the part of the Government, although they are clearly incompetent, however, under any rule of evidence. The Court is not going to exclude them, however, if the Government consents to it.

The witness was then shown a letter signed by U. D. Haynes of San Antonio, Texas, and asked if she had ever seen Mr. Haynes.

A. I saw him in San Antonio, Texas, about 1932, sometime along there. It might have been 1931. I don't just remember when.

MR. KELLOGG: Pardon me just a moment. I didn't note an exception to the ruling of the Court regarding the pictures of the infant and the letter that accompanied it. May I have an exception?

THE COURT: Enter an exception in favor of the defendant.

THE WITNESS: I had a conversation with Mr. Haynes at that time. He did not have any supply of Calcatine until I gave it to him.

MR. KELLOGG: This letter I will offer as the next exhibit in evidence.

(The document referred to was received in evidence as defendant's Exhibit "M".)

MR. PURDUE: Let the record show my objection to the letter is on the ground that there is no foundation laid to show that it was received during the time mentioned in the indictment.

(Testimony of Mrs. Adah Alberty)

MR. KELLOGG: That is the one formerly offered.

MR. PURDUE: And there is no foundation laid to show that it refers to any of the products which form the basis of the counts in the indictment.

THE COURT: My understanding was that the Government did not object to the admission of the letters. Am I mistaken on that?"

"MR. KELLOGG: That is the single letter, your Honor."

"MR. PURDUE: We do object to those after the times covered in the indictment."

"THE COURT: Well, it seems to me the Court, at least, is in considerable confusion here, I regret to say. Let me have the letters that you are talking about."

"MR. KELLOGG: That is the one (indicating), your Honor, that he allowed in."

"THE COURT: Wait a moment."

(The documents referred to were passed to the Court.)

"THE COURT: This marked "Exhibit M". Evidently this has been admitted in evidence."

"MR. PURDUE: It has."

"THE COURT: Now, then, is there any objection to this?"

"MR. PURDUE: No, your Honor."

"THE COURT: It wouldn't have done you any good if there were. That has been regularly admitted.

"What is the question?"

"MR. PURDUE: Counsel interposed an exception to the previous ruling of the Court excluding another letter."

"THE COURT: At this time the Court will strike any order allowing or permitting such exceptions, it not

having been entered at the time. I am compelled to insist upon a little more discipline."

"MR. KELLOGG: Very well, your Honor. I realize I was late in making the exception."

Counsel read to the jury the letter dated December 5, 1932, signed by U. D. Haynes (Exhibit M).

The witness thereupon stated she recognized the letter from Mr. Haynes dated July 29, 1933. It was offered in evidence. Mr. Purdue objected on the ground that the letter showed it was written on July 29, 1933, after the time mentioned in the indictment. Objection was sustained and exception noted.

I did not rely upon this letter in making any claims. I knew of these letters at the time I prepared some of the labels in evidence. The offer in evidence was renewed. Objection was sustained and exception noted. The letter was then marked Defendant's Exhibit N for identification.

A number of letters were then offered by Mr. Kellogg dated in 1933 subsequent to the date of the charges in the information on the ground that they were testimonials from people who used the products charged in the information and were made in toto. The court sustained an objection on the grounds theretofore interposed. An exception was noted.

Defendant's Exhibit O was then offered and received in evidence. Counsel read from said book, particularly page 177 thereof. The defendant was asked at length concerning her experience and explained at length what experience

(Testimony of Mrs. Signa E. Jones—Mrs. Adah Alberty) she had and the reading she had done in connection with the products and her claims for them.

Defendant's Exhibit P was offered in evidence and received. Defendant stated she had used her preparations herself with benefit.

The next witness called on behalf of the defendant was

MRS. SIGNA E. JONES,

who being duly sworn, testified substantially and materially as follows:

DIRECT EXAMINATION

On direct examination, witness testified she had used the preparations charged in the information with benefit.

CROSS-EXAMINATION

On cross-examination the witness stated she had never had a doctor.

The foregoing witness, Signa E. Jones, was introduced out of order, and Mrs. Alberty here resumed the stand for further direct examination.

DIRECT EXAMINATION—MRS. ALBERTY

Mr. Sims told me the Vegetable Compound had been tried out in the middle west and was originated by some physicians there, it had been tried out clinically and that people had been benefited by it and there was a concern in San Francisco marketing the profession and he (Sims) had something like 1000 testimonials; some from Doctors that had taken it with wonderful results. I have

never had one complaint on the Anti-Diabetic Compound that I can remember.

CROSS-EXAMINATION

Letters of Dr. Cullen and others, notably Government's Exhibit 14, and other letters from the Department were referred to. The witness was asked the following question:–

"Q Now, Mrs. Alberty, I will ask you if you don't know it to be a fact, after you came to Los Angeles and the Alberty's Foods were distributed to infants here, that dozens upon dozens of babies were taken to the then City Health Department right across the street from this building and there had to be treated as a result of taking Alberty's Food?

"A Absolutely no. I never even heard of it.

"Q Because of the condition of their stomachs, vomiting profusely and other things? Do you not know that to be a fact?

A I do not, because I offered $100 for any baby that has never gained. I never had anybody come forward to get or claim that $100.

Counsel for the government then went into the experiences of Mrs. Alberty at considerable length. She stated it was her opinion that the Homeopathic Hand Books discussed the symptoms and it is possible for people to treat themselves with homeopathic remedies.

(Testimony of Dr. George Hoover)

Next witness was

DR. GEORGE HOOVER,

called in rebuttal.

Direct Examination.

Dr. Hoover testified as follows: I did not advise Mrs. Alberty that she could use that part of defendant's Exhibit "A" for identification, consisting of the label "Alberty's Calcatine", and containing the wording "aids acidosis, teeth, bones etc., may be taken indefinitely with benefit." I never advised her that she could use the label constituting a part of defendant's Exhibit No. "K", which label reads in part as follows:

"Alberty's Lebara Organic Pellets, aids acidosis, dormant liver, bile secretions, clearing the complexion, not a laxative."

I do not recall specifically advising her concerning the words "dormant liver." In all the experience I have ever had, while in the Government service, or since leaving the Government service, would I approve of those words on any label, regardless of composition. I cannot recall whether I ever made any statement to her in connection with the label constituting a part of defendant's Exhibit "A" for identification, and reading in part as follows:

"Alberty's Organic Phosphate Pellets, organic phosphates—an important essential in composition of nervous tissue";

I can only state that in view of the complexity of the composition of nervous tissue I would not approve or have never approved the reference of organic phosphate to be

(Testimony of Dr. George Hoover)

applied to nervous tissue. I never revised any label for Mrs. Alberty; I never saw any copies of any revised until this case came up.

Cross Examination

I recall that I reviewed her labels and the literature she submitted to me and I made suggestions, in general, with respect to what I believed should be done in connection with the claims, to a limited degree, on such information as I had.

I may have suggested the word "aids" for the word "use" on her label, but I never suggested that in connection with any specified product that I can recall.

With this testimony the evidence was concluded.

The Court instructed in part as follows:

". . . . . What the Court tells you is the law must be accepted by you without qualifications as such, as it would never do to have different views on the part of different jurors as to what the law under which the case is prosecuted is.

"The same is not true, however, of what the facts may be. It is within the province and power, and oftentimes the duty of the Court to comment upon the facts, but that is on the theory that the Court, being more experienced in those matters, is able to be of advice for the benefit of giving advice to the jury, and, if the court should, in this case, either expressly or impliedly express any views of the fact, you will understand that that is for your advise-

ment only, and is in no sense compelling upon you as is the Court's view of the law.

"For the jury exclusively is committed the passing upon the facts and the judging of the credibility of witnesses, what has been proven and what has not been proven. That, of course, is not an arbitrary power. It must be exercised in a reasonable degree and in conformity with the rules of evidence. . . . . .

"To begin with this act is, for people as old as I am, relatively recent. The Pure Food and Drug Act is relatively recent. It was passed first—the time has been given by counsel in his argument—I think in 1930. At any rate, the Act with which we are concerned, or rather the law with which we are concerned, was passed in 1912, I think. At any rate, in a presidential message the then President of the United States used this language: 'In recommending the passage of the Act that we have before us, in my opinion, the sale of dangerous and adulterated drugs, or the sale of drugs under knowingly false claims as to have an effect in diseases, constitutes such an evil that it warrants me in calling the attention—calling the matter to the attention of the Congress. Fraudulent misrepresentations of the curative value of those drugs not only operates to defraud the purchasers but is a distinct menace to the public health. There are none so credulous as sufferers from disease. It necessitates legislation which will prevent the raising of false hopes of speedy cures of serious ailments by misstating the effects of worthless mixtures on which the sick will rely while their diseases progress unchecked.'

I have selected that because, while it is not, perhaps, strictly necessary, it is enlightening as to the genesis or

origin and foundation of this law and expresses very clearly the reason for its adoption.

Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners. It was to leave no doubt upon this point that the words 'false and fraudulent' were used. This phrase must be taken in the accepted legal meaning and thus it must be found that the statement contained in the package or label was put there to accompany the goods with actual intent to deceive. An intent which may be derived from the facts and circumstances, but which must be established beyond a reasonable doubt ....

"The law requires that the Government must prove beyond a reasonable doubt not only the statements upon the labels are false, but also that the statements are fraudulent. The statements may be false and not fraudulent. ....

"This defendant is presumed to be innocent, and in that respect the information does not create any sort of a presumption against her. The burden of proof is upon the Government to prove her guilt beyond a reasonable doubt.

"Reasonable doubt is a term that has received a great deal of attention from courts, and it is the subject of definition. To justify you in returning a verdict of guilty the evidence must be of such a character that to satisfy your judgment to the exclusion of all reasonable doubt. If, therefore, you can reconcile the evidence with any reasonable hyp*h*othesis consistent with the defendant's innocence it is your duty to do so. In that case you must

find the defendant not guilty. And, if, after weighing all the proof, and looking only to the proof, you honestly entertain a belief that the defendant may be innocent of the charge against her, she is entitled to that benefit of that doubt and you should acquit. . . . .

"The element of profit is, in a sense, a false element in as far as the offense itself is concerned. It is not an element at all and you are not to be governed in your judgment by the fact that the defendant made money out of it. However, the fact that it was highly profitable might furnish a motive for the defendant to do what otherwise she might not have done. To that extent it may properly be taken into consideration by the jury."

"Are there any exceptions?"

MR. PURDUE: If your Honor please, may I suggest one addition? In the respective counts several misrepresentations in the labeling are charged. May I suggest to your Honor a proposed instruction that if any one of the charged misrepresentations are found to be in fact a misrepresentation that such would authorize a conviction as to that particular count.

THE COURT: Any material misrepresentation would be effective notwithstanding the truth of the others. I think that is fairly familiar.

Are there any exceptions on behalf of the defendant?

MR. KELLOGG: I would like to ask your Honor, in view of the last instruction, that you instruct the jury also that even though they find it is in truth a misrepresentation it must be fraudulently made.

THE COURT: I think they have been so instructed to that effect.

MR. KELLOGG: Generally, yes.

THE COURT: The very language of the act itself has the two elements in it.

After the jury had recessed at 3:06 P. M. on the 10th day of December, 1936, the recess was declared until return of the jury. At 5:25 o'clock P. M. the jury returned for further instructions. At that time the Court further instructed the jury as follows:

"THE COURT: You asked, gentlemen: Are the labels in reference to counts 3, 4, 5, 6 and 7 shown in the counts in these counts revised labels applied to products seized and later released by the Government?

No, they are not. That procedure is this: Whenever goods are seized, at least goods of this character, if the matter is contested the defendant in the case is tried on the same issues as we try this one, as to whether or not it violates the Act. Then, if the judgment is in favor of the defendant, of course that settles it. The goods must be restored. If the judgment is in favor of the Government, there is a procedure, and the law permits that, under which the defendant may, by going through certain formalities, take the goods and re-label them, correctly label them.

Now, in this case, naturally, the first stage of the proceeding was reached only—and I think I am correct in saying this—that there was no re-labeling. That is, these goods involved in this suit were not released to the defendant.

MR. KELLOGG: Yes, your Honor, the evidence shows that they were.

THE COURT: Whether they were or not is a matter of no importance in this case at all. What happened subsequent to their seizure is of no importance in the case at all. The labels mentioned, that you are inquiring about, were the ones that were on at the time—that were on the goods at the time of the seizure, and are not ones that were put on later. In other words, they were not revised labels. Do I make myself clear?

Now, gentlemen, I trust that you will return to your room and see if you cannot reach an agreement on this case.

It is the business of the juror to consult, of course, among yourselves. That is what you are here for. You are all business men and doubtless associates, perhaps, or at least acquaintances, many of you are and naturally you are expected to discuss the case among yourselves, and not to hold, necessarily, to rigid opinions, but you must not give up your opinion until you are convinced that it may not be right. However, you are at all times to listen to the views of your fellows and, having in mind at all times the facts of this case, see if you cannot arrive at a verdict.

Now, retire.

(Thereupon at 5:30 o'clock P. M., the jury retired for further deliberations.)

THE COURT: We will recess until the return of the jury.

MR. KELLOGG: May I address the Court?

THE COURT: Yes.

MR. KELLOGG: The last instruction given the jury, your Honor, there you stated that they were to disregard

all of the evidence concerning what was done after the seizure.

THE COURT: To do what?

MR. KELLOGG: That they were not to consider as evidence what was done after the seizure.

THE COURT: Not after the seizure. In fact, there is no evidence in the case when the seizure happened. Now, what I told them was that—I intended to tell them the fact that—the goods that were seized had no reference to the case and what was done with reference to the seizure, or the re-labeling, or that sort of thing, after the seizure, was of no materiality in the case.

MR. KELLOGG: That was said, and I had in mind all of the evidence introduced upon that point went to the good faith of the defendant.

THE COURT: Well, I don't see how. In the first place, is there any evidence in the case as to what was done after the seizure?

MR. KELLOGG: Yes, your Honor.

MR. PURDUE: I think your Honor made it quite clear in your instructions to the jury that it was confined to simply what the Judge decreed on that particular case, and what was done concerning the labeling. That is the Judge's statement.

THE COURT: Even if—or rather, the instruction was intended to be to the effect that if an offense were committed it was committed at the time of the seizure, when the goods were seized and it couldn't have been committed later, and the fact of the seizure and the subsequent legal proceedings of the re-labeling were of no materiality. That is sound law.

MR. PURDUE: Yes.

THE COURT: The fact that a person came in and consented to re-label goods would not be admissible, against the objection of the defendant, because it would tend to show an admission against interest, perhaps, by him.

MR. KELLOGG: In this particular instance, the fact was that before there was any hearing—

THE COURT (Interrupting): Before what?

MR. KELLOGG: Before there was any hearing at all there was a re-bonding and that was brought out in the Government's case.

THE COURT: I appreciate that, but that was after the seizure.

MR. KELLOGG: That is correct. Then, you see—

THE COURT (Interrupting): But the information charges the offense as having been committed at the time of the seizure. Of course you agree to that?

MR. KELLOGG: Oh, yes.

THE COURT: Otherwise it wasn't committed at all.

MR. KELLOGG: The evidence was allowed in here upon the theory of the defense that it was permissible as tending to show—remember, it was the Government's evidence—that even after this seizure she continued her course of good faith with the Government about the re-labeling. Now, to exclude that lends the fact of the seizure an implication, under the instruction, that the goods were decreed to be misbranded in that action and that thereafter she took a bond and released them.

THE COURT: If that is the case the instructions are a lot more favorable to the defendant than they otherwise might be because my understanding of the situation is this: The defendant is charged with sending out the

mis-branded goods. That was completed as of a certain time before, or at least on the date of the seizure, and if the goods were seized there is no showing in the information to show that.

All right. Then that was a completed offense, if it was any offense at all. There is no doubt about that at all. Now then, if it could be shown that later on the defendant consented to a re-labeling of them that clearly would be objectionable if the defendant did object to it, on the ground that it might argue some doubt that it was an admission from her just exactly as an offer to compromise might be under the Code of Civil Procedure.

Now, I am not clear on what evidence is in the case, but the jury was instructed that nothing that took place after the seizure, in respect to the seizure proceeding, was of any moment at all. That is sound law.

MR. KELLOGG: Your Honor, my objection goes to the fact that the evidence was introduced in the case in chief showing what happened to the goods and showing continuous transactions with the Government clear down until 1934, and since it is in evidence an instruction should be given that would cover the point so as to show there was no decree against the defendant in that action I might allude to the fact that counsel used that very fact in his argument, and I answered it in *mind,* when he stated or mentioned that the goods had been seized and that she had come in and re-labeled them. He mentioned that in his argument.

THE COURT: Even so, you are contending that she should have the benefit of the fact that she re-labeled them because it would show or tend to show that prior to that she had a disposition to comply with the requirements of the Government.

MR. KELLOGG: That is right.

THE COURT: I do not think it is important. In the first place I do not think that the instruction is capable of any misunderstanding, it having reference to the legal proceeding entailed after the seizure, and that the jury clearly understood that if any offense was committed it was committed before the seizure. I do not think there is any room for doubt on that at all. In fact, I would think in other instanves it is so remote that it would be hardly enough to justify the instruction.

MR. KELLOGG: May I have an exception for the record, your Honor.

THE COURT: Of course the exception is supposed to have been in the presence of the jury. You know that.

MR. KELLOGG: I thought that perhaps I ought to discuss it out of their presence.

THE COURT: Let the record stand as it is. We will recess until the return of the jury.

The jury had retired again at 5:30 for further deliberation and recess was taken after the foregoing conversation between counsel and the Court at 5:40. The jury returned to the court room at 6:15 P. M. Its verdict was then returned in court and the jury found the defendant guilty on each and all of the ten counts of the information.

Thereafter and on Saturday, December 12th, the defendant filed a motion for a new trial. Said motion was heard by the court at two o'clock Monday, December 14th, 1936, at which time the case had been set for sentence. The motion was argued.

The motion for a new trial was denied.

The motion and arrest of judgment was then presented to the court and the court denied the arrest of judgment.

The court then stated as follows:

We will now take up the sentence. There seems to be ten counts here, and altogether I am of the very decided opinion that the offense of the defendant was entirely wilful, deliberate and wilful and in the face of warnings from the Department.

The defendant is adjudged to pay a fine of $100 with respect to each of the ten counts, and shall stand committed in the custody of the United States Marshal until the fine is paid.

She is also adjudged to pay the costs of the prosecution of the case. That means the actual expense that the Government has been put to by reason of the prosecution. I am not advised as to the extent of such expenses, but I have in mind the cost of bringing the witnesses from Washington here, outside of the State.

MR. PURDUE: If your Honor please, may I suggest an interpretation of the order concerning costs? May it be as in such statutes made and provided? In other words, the statute is clear as to just what kind of costs can be covered. I have in mind that it includes the expenses of bringing Government employees here as witnesses.

THE COURT: Very well. A cost bill will be filed?

MR. PURDUE: Yes, your Honor.

THE COURT: And a copy furnished to the defendant's counsel.

MR. KELLOGG: Your Honor, at this time we would like to give notice of our intention to file a petition for an appeal. The matter of appeal being filed and perfected the defendant would be entitled to remain at liberty upon the terms that have been laid down by the Court, and I would like to have that matter determined so that she will not have to remain in custody pending the filing of such a petition.

Thereupon the court gave the defendant opportunity to furnish bail pending the appeal.

The court fixed the bond at $1000.00 on appeal.

Thereupon the above entitled matter was concluded.

From the rendering of the judgment and sentence the defendant appealed on the 14th day of December, 1936, within the time allowed by law.

Thereafter and on the 8th day of January, 1937, and within thirty days from the taking and perfecting of said appeal, the Court made and entered its order herein, which was duly filed on the 8th day of January, 1937, extending the time for the defendant to file her Bill of Exceptions and her Assignment of Errors with the Clerk of the above entitled Court in regard to the appeal to and including the 13th day of February, 1937.

Thereafter and on the 13th day of February, 1937, the defendant duly and regularly served and filed her Bill of Exceptions, together with her Assignments of Error in connection with her appeal.

Now, in as much as the time within which said Bill of Exceptions could be filed expired on the 13th day of February, 1937, and the Bill could not be completed to include the exhibits, the defendant tenders the Bill of Exceptions herewith, together with the request for certification of the original exhibits as her Bill of Exceptions, said certification to be upon the ground that it is impractical to print the exhibits as a part of the Bill of Exceptions, and prays that the same may be signed and approved by the Judge of this Court presiding at the trial, to-wit, the Honorable George Cosgrave, pursuant to the statute in such case made and provided to be filed and made a part of the record herein, which is accordingly done this 13th day of February, 1937, which is within the time heretofore granted by the Court.

KELLOGG & MATLIN

By Hiram T. Kellogg

Attorneys for Defendant, Adah Alberty.

Presented Feb. 13, 1937.

Geo. Cosgrave

U. S. Dist Judge

[Title of Court and Cause.]

CERTIFICATION SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions was filed on the 13th day of February, 1937, within the time allowed for the filing of said bill of exceptions by law and by the order of the United States District Court for the Southern District of California, Central Division, duly made and entered on January 8, 1937, extending the time for the filing of said bill of exceptions to and including the 13th day of February, 1937.

Said bill of exceptions contains all of the evidence in condensed and narrative form given or offered on the trial of United States of America, Plaintiff, vs. Mrs. Adah Alberty, trading as Alberty Food Laboratories, Defendant, and correctly shows all of the proceedings had prior to and during said trial, including that part of the instructions, given or refused, requested by the parties, and that said bill of exceptions is correct in all respects and is hereby proved, allowed and settled and made a part of the record herein, all within the time allowed by law.

DATED this 11th day of March, 1937.

Geo. Cosgrave
UNITED STATES DISTRICT JUDGE

[Endorsed]: Received copy of the within Bill of Exceptions this 13th day of February 1937 Peirson M. Hall, U. S. Atty, & Howell Purdue, Asst. U. S. Atty. Attorneys for Plaintiff Lodged Feb 13 1937 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk Filed Mar 11 1937 R. S. Zimmerman, Clerk By J M Horn Deputy Clerk.

[Title of Court and Cause.]

NOTICE OF APPEAL

TO THE UNITED STATES OF AMERICA, PLAINTIFF IN THE ABOVE ENTITLED ACTION, AND TO PEIRSON M. HALL, UNITED STATES DISTRICT ATTORNEY FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, AND TO R. HOWELL PERDUE, ASSISTANT UNITED STATES DISTRICT ATTORNEY FOR SAID DISTRICT:

Name and address of appellant: Adah Alberty, trading as Alberty Food Laboratories, 729 Seward Street, Hollywood, California.

Name and address of attorneys for appellant: Kellogg & Matlin and Hiram T. Kellogg, 1102 W. I. Hollingsworth Building, Los Angeles, California.

Offense: Violation of the Act of Congress of June 30, 1906, known as the Food and Drugs Act (34 Statutes at large 768) as amended by the Act of August 23, 1912 (37 Statutes at large, 416, U. S. C. Title 21, Sections 2 and 10). The information charges ten separate counts of violation.

Brief description of judgment or sentence: A fine assessed against the defendant in the sum of One Hundred ($100.00) Dollars upon each of said counts, or a total of One Thousand ($1,000.00) Dollars upon all counts, and payment of costs of trial as provided by Statute.

Name of prison or jail: Los Angeles County Jail.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

DATED this 14th day of December, 1936.

Adah Alberty,
ADAH ALBERTY,
Appellant.

GROUNDS OF APPEAL

The appellant sets forth the following grounds of appeal:

1. That the Court erred in admitting into evidence over the objection and exceptions of the defendant that booklet known as, "Calcium, The Staff of Life," and marked Exhibit....., for the reason that said booklet contained irrelevant, incompetent and immaterial matter; that no proper foundation was laid for the issue of it; that it was not a part of the charge against the defendant, nor part of the label nor package of the goods with which she is charged in the information, and that the Government did specifically fail to prove that said booklet was at any time contained in all or any of the packages alleged to have been sold in alleged violation of the law by reason of an alleged misbranding thereof. That the introduction of said booklet into evidence, coupled with the reading of excerpts therefrom by the United States District Attorney constituted prejudicial error and placed before

the jury matters not directly relating to the issues to the prejudice of the defendant.

2. That the Court erred in admitting into evidence a book purported to be the work of or by the defendant known as, "The Hour Glass," and admitted as Exhibit ....., in that said book was incompetent, irrelevant, and immaterial as evidence, and that no proper foundation was laid to show the time and place of the alleged receipt of said book by the witness for the Government, and in that said book contained matters that were not related to and had no bearing upon the issues in this case; that the said book contained matters and excerpts read by the United States District Attorney to the prejudice of this defendant, Adah Alberty, before the jury. That all of said evidence was introduced over the objection and exceptions of the defendant, and without a proper foundation being laid to show that said book was a part of the package or label of any of the articles or products with which the defendant is charged in the offenses stated in the information with misbranding, and that said book was introduced in evidence and excerpts read therefrom to the prejudice of the defendant before the jury.

3. That the Court erred in permitting United States District Attorney to cross-examine the defendant and to ask her by his own manner of statement whether or not she knew that 150 babies had been taken to the Health Department of the City of Los Angeles in a vomiting condition and sick and ill from using Alberty Foods, when Alberty Foods was in no manner the subject of mis-

branding in any of the counts of the information. That the Court erred in permitting the United States District Attorney to introduce into evidence by his statement and by reading from excerpts of the defendant's other extraneous advertising matter; the price charged for the articles with which she is charged with mis-branding in the several counts of the indictment, and that the Court erred in permitting the United States District Attorney to question the defendant upon cross-examination as to the amount of profits made by her in the year, 1933, from the sale of her products all of which were calculated to and did prejudice the defendant before the jury. That each and all of said matters were introduced into evidence over the objections of the defendant and exceptions noted.

4. That the verdict is against the law and the evidence and the whole thereof.

5. That the verdict is against the greater weight of the evidence.

6. That the Court erred in permitting the United States District Attorney by his conduct of the case to inquire into the extraneous matters of the defendant's business not connected with the issues upon trial, and by charge to the jury wherein the Court read the message of President Taft to Congress at the time that bill subsequently enacted as the Shirley Amendment was sent by said President to Congress.

7. That the Court erred in not allowing the defendant her motion in arrest of judgment upon the ground that

the information fails to state facts sufficient to constitute an offense under the law charged in each and all of the several counts of the information.

8. That the sentence and judgment of the Court as to this defendant is cruel, unusual and harsh so that it is clearly in violation of the defendant's rights under the VIIIth Amendment of the Constitution of the United States of America.

9. That the Court erred in denying to the defendant her motion for a new trial upon the issues.

10. That the Court erred in permitting the plaintiff to introduce into evidence letters, booklets and books all relating to "Alberty Foods," when all of said evidence had no bearing, and was not in any manner material to the charge upon which the defendant was being tried. That all of said evidence prejudiced the rights of the defendant and prevented the defendant from having a fair trial.

11. That the Court erred in permitting the trial to be conducted both by the Government and by the manner of the court in conducting the trial so that the jury's face was turned in the direction of the defendant's guilt at all times instead of in the direction of the defendant's innocence, thereby preventing the defendant from having a fair trial.

12. That the Court erred in permitting the United States District Attorney to read, over the objection of the defendant and exception duly noted, repeatedly the price

at which the products of the defendant were sold, and to repeatedly lay before the jury the statement, "$1.00 per bottle, six bottles for $5.00"; to permit the United States District Attorney to inquire into the purchase price by the defendant from the manufacturer products she is charged with misbranding, and particularly to permit the question upon several ocasions during the trial, "Isn't it true that you paid 50¢ per pound for Calcatine and sold it at $1.00 for four ounces?"

13. The Court erred in permitting United States District Attorney to refer at the time of the cross-examination of the defendant to her profits and to ask the question, "Isn't it a fact that your profits were over $20,000.00 in the year 1933?" all over the objection of the defendant and exceptions noted by the defendant to the question, and to the prejudice of the defendant before the jury.

14. That the Court erred in permitting the Deputy United States District Attorney to argue to the jury upon the question of defendant's costs, profits and earnings, and to comment upon the profits and earnings of the defendant, all to her prejudice.

15. That the Court erred in returning the jury from the jury room after the case had been submitted to it, and giving to it an instruction, over the objection of the defendant, and in that the defendant's counsel informed the Court while the jury was still within the jury room and could be recalled for further instructions that in the opinion of the defendant and defendant's counsel the in-

struction was erroneously given, that it precluded from consideration by the jury all evidence subsequent to the date of the violations alleged in the information; that it precluded from jury consideration by the manner of such instruction consideration of all the evidence tending to show good faith upon the part of the defendant, and deprived her of the right to have the jury properly instructed. And in this connection the defendant would call the Court's attention to the fact that up to the time of such instruction the jury had been out for more than two hours and thirty minutes, and that thereafter and within thirty minutes the jury returned a verdict of guilty. That the Court in the interests of justice should have recalled the jury and given a proper instruction at the request of defendant's counsel, and that the failure upon the part of the Court to return the jury and give them such instruction was highly prejudicial to the defendant.

DATED this 14th day of December, 1936.

KELLOGG & MATLIN
By Hiram T. Kellogg
Attorneys for Appellant.

ADAH ALBERTY
Adah Alberty, Appellant.

[Endorsed]: Filed Dec 15 1936 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

UNITED STATES OF AMERICA, Plaintiff, vs. MRS. ADAH ALBERTY, trading as ALBERTY FOOD LABORATORIES, Defendant.	No. 12177-J-(C) ASSIGNMENT OF ERRORS

Comes now the defendant, Adah Alberty, appealing in the above entitled action by and through her attorneys, and files and presents to the Court her assignments of error, whereby the said defendant as appellant assigns errors in the records and proceedings in the District Court of the United States, within and for the Southern District of California, Central Division, in the above entitled cause, the following particulars and errors, to-wit:

1. That the Court erred in overruling and denying the motion of the defendant for a new trial in this cause over her exception at the time.

2. That the Court erred in overruling the objection to the following testimony given by the witness, Andrew J. Brown, over the objection and exception of the defendant as follows, to-wit:

Andrew J. Brown, who had testified he was Chief Inspector for the Western District of the Food and Drug Administration, upon being shown a pamphlet with the title, "Calcium, The Staff of Life," by Adah Alberty, stated that he was familiar with it. Upon voir dire examination he was asked the following questions and gave the following answers:

Q. Mr. Brown, this pamphlet was not contained in the bottles or in the package of any articles that you or the Government seized at any time, was it?

A. No, sir.

Q. It was matter that you picked up in the laboratory, wasn't it?

A. It was a pamphlet that was on the counters for distribution at places that stocked Alberty's Foods.

Upon the document being offered in evidence by the Government, the defendant objected upon the ground that the document or pamphlet was not within the charge and not material; that it was incompetent, irrelevant and immaterial, and not proper evidence.

The witness being further examined and asked if he had seen the book in different places stated, "Oh, I would hate to say. Probably a dozen or more."

Q. Now, what were those places?

A. Places that stocked so-called health foods, especially places that stocked Alberty's Foods.

Thereupon the Court asked the witness, "Well, do I understand that you found this document in various places in these several States that you have described?"

The Witness: Yes, sir.

The Court: All of them?

The Witness: Yes, sir.

The Court: Undoubtedly it was used to further the sale or to explain, at least, or, rather, for the use of those who might be interested in buying the products. I take it that was the purpose of the document. It seems to me it would be admissible.

The defense objected upon the ground that it was incompetent, irrelevant and immaterial, and it was not shown to have been a part of the package charged in the violation, and not part of the violation of the Food and Drug Act under discussion or charged; that it was collateral or outside advertising, and not part of the label or violation, and on that ground the defense objected to introduction of any collateral matter at that time, and upon the further ground that no proper foundation had been laid.

The objection was overruled and an exception noted.

3. That the Court erred in overruling the objection to the introduction into evidence by Government counsel reading to the jury from Page 18 of "Calcium, The Staff of Life," as highly prejudicial.

4. That the Court erred in overruling the following testimony given by the witness, George P. Larrick, over the objection and exception of the defendant as follows:

He stated that he knew Mrs. Alberty, that he had a conversation with her on September 4, 1934, at his office.

Question by Government counsel, "Anyone else present besides you two?"

A. No.

Q. Now, tell the jury, briefly, what was said concerning the book, "The Hourglass."

The defense then objected upon the ground that it was *in*competent, irrelevant and immaterial; that no proper foundation had been laid, and the conversation was in 1934 at a time after the alleged offenses, and that the book had no bearing on the violation. The defense noted an exception. (The former witness, Andrew J. Brown, had testified he had seen the book, "The Hourglass," in places where it was offered for sale, and when objected to at that time the Court had pointed out the evidence did not justify admission, but upon the offer being renewed after the testimony of Mr. Larrick, and the above objection having been given, the conversation of Mr. Larrick with Mrs. Alberty about the book was admitted into evidence.)

5. The Court erred in denying a motion made by the defendant at the conclusion of the following testimony of Mr. Larrick to strike all of the testimony of Mr. Larrick upon the ground that it was incompetent, irrelevant and immaterial, and did not tend to prove any issue in the case, over an objection of the defendant, said testimony being substantially as follows:

"On September 4, 1934, Mrs. Alberty called at my office protesting against certain action that the Government had instituted, or was planning to institute, to her knowledge, against her products. During the course of that conversation I pointed out to her, in great detail, why the Government was bringing this action, and during the time of that conversation I displayed this book to her and read numerous portions of it to her to show that certain of the claims there were the basis of the action that we were bringing and certain of the claims

which the Government had repeatedly told her were not justified, in fact.

"I also discussed this little booklet with her and pointed out to her that this booklet contained many statements, descriptions and devises which, in the opinion of the Administration, were grossly in violation of the law.

"During the conversation she agreed with me that she did use these booklets, generally, throughout the United States in health food stores in connection with the sale of her products and also that the book, "The Hourglass, What Time Does to Us," was on sale in a great many of these so-called health food stores throughout the country and that the book does make numerous statements telling how the medicines are to be used and what they are to be used for. In fact, explaining many of the things that appear on the labels of this product."

Thereupon Mr. Purdue stated, "You may cross examine."

The motion was made at that time to the Court that the testimony of the witness be stricken upon the ground that it was incompetent, irrelevant and immaterial, and did not tend to prove any issues in the case. The motion was denied and an exception was noted.

6. That the Court erred in overruling the objection made to the following testimony given by the witness, Dr. Edward P. Clark:

Q. What would you say, Doctor, as to such a remedy being furnished for the use of the public in general without an individualistic diagnosis from the standpoint of it being harmful or harmless to the patient?

Dr. Clark: "It would be of no benefit to the vast majority of cases and patients."

The testimony was objected to upon the ground that it was incompetent, irrelevant and immaterial and not proper subject for an opinion as there had been no proper foundation laid for an opinion as to what the drug could do to the general public. The objection was overruled. Exception.

7. The Court erred in its comments upon the evidence at this point, wherein the Court stated, "It goes to the patient. That is my understanding, that counsel means a patient suffering with some of the diseases described. He has merely put it in a little more general way, that is to say, as to the effect whether it is beneficial or injurious and, of course, that is the ultimate of all medical matters."

8. The Court erred in denying the motion of the defendant to strike the following testimony of the witness, Dr. Clark:

Q. What would be the effect of the patient's treatment being confined to the taking of such a preparation?

A. Then they are neglecting things that would help them.

Q. Now, explain your answer more fully, Doctor.

A. Well, that is what I meant when I said that the patient being given confidence in a remedy that can have no benefit to him is being done harm because they are neglecting to take the proper remedies that might help them.

"A person that has a case of diabetes, for instance, if on reading the pamphlet or being told that something is good for diabetes, and that remedy is not good for diabetes, then the patient neglects the treatment that we know is good for diabetes and consequently they are likely to go on to convulsions, diabetic coma, and when they are in that condition, 50 per cent, or a larger percentage, die, because of a neglect of a known medicine that is better than anything of this kind."

Counsel for the defense, Mr. Kellogg, stated, "Pardon me, counsel. I didn't appreciate from the question, your Honor, the scope the answer would take. May I have at this time a motion granted to strike the answer for the purpose of an objection?"

The Court: "Yes."

Mr. Kellogg: "It is objected to on the ground that it is incompetent, irrelevant and immaterial, and not within the issues, and no proper foundation has been laid."

The Court: "The motion is denied."

Objection overruled. Exception.

Dr. Clark was called out of order in the middle of the examination of Mr. Larrick, who was thereupon recalled.

9. That the Court erred in overruling the objection to the introduction in evidence of the book, "The Hourglass," as Government's Exhibit No. 11 when offered a second time at the end of the examination of Dr. Hoover. The introduction of the book, "The Hourglass," was objected to on the ground that it was incompetent, irrelevant and immaterial, and not within the issues of the charges before the Court, and not proper evidence of a violation of the acts charged against the defendant, and no proper

foundation had been laid. The objection was overruled. Exception.

10. That the Court erred in overruling the objection of the defendant to the reading of excerpts from the book, "The Hourglass," and to making the following statement in the presence of the jury:

Mr. Purdue: For the purpose of illustration, I wish to read two or three brief excerpts. They will be limited, so as to expedite the time.

Mr. Kellogg: If your Honor please, I suggest that manifestly it is unfair—I realize that a book of this dimension is hardly to be read to the jury in its entirety, but, to read excerpts from that book would be hardly fair.

Mr. Purdue: Of course, the book is in evidence, and counsel may read any part he chooses and the jury, at a later time, with the permission of the Court, can take it to the jury room for examination of the whole.

The Court: I have always thought it was a fair enough practice, when a document was introduced in evidence, for either party to read such portions thereof as he sees fit. I recognize what you say, that its size may be difficult, but I will, under the circumstances, however, permit counsel to call attention to the jury of such parts of the book as he sees fit and the jury is cautioned, of course, to remember that it is only a small part of the book. At least, I hope he is not going to read the whole book at this time.

11. That the Court erred in permitting Mr. Purdue to read from the book, "The Hourglass," Government's Exhibit No. 11, as follows:

"How the human race became calcium-starved.

"Naturally you will ask, 'How did I become calcium-starved?'

"Calcium starvation may be brought about in a number of ways. To begin with, the majority of babies are now born calcium-starved and the deficiency has never been made up. Statistics show that 91 per cent of all the babies born are calcium-starved."

"A few generations ago, it was only the premature infant that was born deficient in calcium.

"The foetus is a 'calcium parasite' because it requires a large amount of this element, and, in order to obtain it, it draws upon the maternal tissues in a way that often seriously impoverishes the mother, and even at that, fails to get all it needs and consequently it is born calcium-starved."

12. That the Court erred in permitting Mr. Purdue to read from the book, "The Hourglass," the following language from Page 170 of said Government's Exhibit No. 11:

"The Course of the World—Acidosis.

"Acidosis spells disease, old age and death. It is the grim reaper's most effective weapon. Premature old age and ill health are brought about by acidosis, which changes the chemical elements or hormones of the internal secretions of the glands that govern the processes of metabolism. These glands are the parathyroids, thyroid, testicles, ovaries, adrenals and the pituitary body."

13. That the Court erred in permitting Mr. Purdue to read from the book, "The Hourglass," Government's Exhibit No. 11, at Page 231 as follows:

"Syphilis—Inherited—Babies.

"When a baby is born with inherited syphilis it can be eradicated in a short time, if taken in the early months of life.

"The mother's milk is rarely indicated in such cases, even though she herself may have escaped, as her blood more or less is affected.

"These babies should be placed on Alberty's Food as soon as possible, as results will be more pronounced when metabolism is at the maximum, than when the child gets older.

"Alberty's Calcatine should invariably be used in conjunction with Alberty's Food. No orange or prune juice should be given."

14. That the Court erred in permitting Mr. Purdue to read from Page 259 of the Book, "The Hourglass," Government's Exhibit No. 11, as follows:

"Calcatine.

"Calcium is essential to health and long life.

"Alberty's Calcatine helps to offset acidosis and 'speeds up' cell reproduction by supplying a base for the new cells. While Alberty's Food supplies the body with its daily need of calcium, the more calcium supplied, the sooner one will recover health. The entire body feels its revitalizing effects. Calcatine is especially beneficial and a valuable remedy in anemia, tuberculosis, all chronic or wasting diseases, swollen glands, ulcers, headaches, too rapid decay of the teeth, pimples, neuralgic rheumatism, prevents gallstones, acidosis, Bright's disease, goitre, pancreatic diseases, etc. Calcatine is not a medicine but a valuable tissue and cell salts. $1.00 per bottle, six bottles for $5.00."

15. That the Court erred in overruling the objection made to the following testimony given by the witness, Dr. Clinton H. Thienes:

Q. Doctor, assuming that an analysis was made of a sample consisting of bottles labeled "Calcatine" and that the sample showed the following: The substance contained in the bottles consisted of white tablets, principally of milk sugar and a small amount of inorganic salts.

More specifically, the analysis showed an average weight—an analysis of 100 tables—of .0783 grams, or 1.208 grains per tablet, and that there was present ash in quantity, 0434 per cent. The analysis further showed the ash to consist principally of calcium phosphate with traces of iron, magnesium, sodium and potassium. Also the analysis showed a trace of chlorides to be present.

Please state whether or not such a preparation would be of any benefit for use in the treatment of acidosis?

Assume the dosage as follows: Take three pellets every two hours for the first 30 days, then three pellets before meals. Dissolve on tongue. Babies, one pellet*t* each bottle.

A. The lactose, or milk sugar, if taken in many times this dosage, in the presence of a carbohydrate starvation, since lactose or milk sugar is one of the carbohydrates which the human body utilizes might, and if the acidosis were due to carbohydrate starvation—that is, if a person were getting nothing but meat, or starches, acidosis of that origin might be overcome temporarily, or at least by taking large amounts of milk sugar, but in this dosage, three tablets every three hours, I believe, would amount, if it were carried out through the 24 hours—36 tablets, about a grain each, 36 grains, and about a half a teaspoon-

ful, roughly—if my calculation is correct—but a half a teaspoonful a day would certainly have no effect upon that type of acidosis

And, upon other types of acidosis, it would probably have very little effect. There might be some particular times where large enough amounts would have an effect, but in this small dosage it could not have any appreciable influence on any of the types of acidosis.

Now, as to the ash, the amount of calcium phosphate is infinitesimal. Put one tablet in a bottle of milk would be—now, milk contains calcium phosphate and that is the chief source of calcium phospate or calcium phosphorus that the infant has, but a quart of milk contains approximately one gram of calcium which would be, roughly—two contains about seven-tenths of a gram of calcium, or roughly somewhere between one gram and 1-½ grams—I am just making a rough calculation here of the calcium phosphate—now, the amount of calcium phospate in one of these tablets is in the region of a fraction of another gram.

One tablet would contain, perhaps, as much calcium as a few drops of milk.

Now, it would amount to putting three or four more drops of milk in a bottle, as far as the calcium phosphate is concerned.

There is a considerable quantity of sodium, magnesium, iron and traces of iron, at least, in milk, certainly more than in one of these tablets—and the other elements listed are all found in milk, and there is milk sugar in milk, so it would be just a matter of adding a few more drops of milk to the bottle. That is about what it would amount to

and therefore in itself would have any influence upon any conditions of acidosis in an infant.

The testimony was objected to upon the ground that it was incompetent, irrelevant and immaterial, and no proper foundation had been laid; that it was an improper form of hypothetical question.

The objection was overruled.

16. That the Court erred in sustaining the objection to the following question of the witness, Dr. Thienes:

Q. You wanted to impress this jury with the possibility that a condition of acidosis might be the result of cancer somewhere in the body?

It was objected to as wholly argumentative and improper.

The objection was sustained.

17. The Court erred in overruling the objection made to the reading by Government counsel, Mr. Purdue, and the following statement from an Alberty publication not contained in a package:

Q. Now, Doctor, would the preparation given in the dosage stated to you be of aid in the case of a child named "June who, since the age of two years had not been robust. She grew slowly, had no appetite and suffered from malnutrition. Between the ages of 12 and 13 she had not gained any weight and grew less than one inch in height. At the—

Mr. Kellogg (Interrupting) Well, now, just a minute. That is objected to on the ground that no proper foundation has been laid. There is no showing that the Doctor ever saw this patent and it is going into the field of conjecture to determine whether or not those are true facts.

The Court: Why is the question material, Mr. Purdue?

Mr. Purdue: Why?

The Court: What are you reading from?

Mr. Purdue: I am reading from Page 45 of the defendant's booklet, "Calcium, The Staff of Life."

The Court: Is that something in evidence?

Mr. Purdue: Yes, sir; it is in evidence and it was the statement of conditions set forth and follows up the status on Alberty's treatment and gained seven pounds in weight and grew one inch in height in two months.

The Court: The objection is overruled.

Mr. Kellogg: Note an exception, your Honor.

The Court: Yes.

18. The Court erred in permitting Mr. Purdue to again read the question following over the objection and excepception of the defendant:

"Since the age of two years, had not been robust. She grew slowly, had no appetite and suffered from malnutrition. Between the ages of 12 and 13 she had not gained any weight and grew less than one inch in height."

"So, at the age of 13 she started on Alberty's treatment and she is now 13 years old, and would that preparation which I have stated to you be of advantage to that child given in the dosages which I have indicated?

The question was objected to on the ground it was incompetent, irrelevant and immaterial, and no proper foundation had been laid.

The Court overruled the objection. Exception.

19. That the Court erred in permitting Government counsel to read the following statement to the witness, Dr. Egbert E. Moody, from Page 145 of "The Hour Glass".

"Calcium starvation may be brought about in a number of ways. To begin with, the majority of babies are now born calcium-starved and the deficiency has never been made up. Statistics show that 91 per cent of all the babies born are calcium-starved. A few generations agoo it was only the premature infant that was born deficient in calcium.

"The foetus is a 'calcium parasite' because it requires a large amount of this element, and, in order to obtain it, it grows upon the maternal tissues in a way that often seriously impoverishes the mother, and even at that fails to get all it needs, and consequently it is born calcium-starved."

The book was already in evidence, but to permit the doctor to be questioned thereon was highly prejudicial, and is assigned as error.

20. That the Court erred in making a statement to counsel in front of the jury as follows:

"A person might believe that some very injurious element is good and there may be no foundation for that belief. Do you think that would be a justification or a defense against a charge of misbranding under the pure food and drug act? I hardly think so."

Said statement of the Court was of a prejudicial character to a fundamental defense of the defendant. It was one to which counsel could not very well openly object in view of the deference necessarily paid to the Court, so

there was no objection taken and no exception noted to the specific statement of the Court.

21. That the Court erred in sustaining objection to the testimony of Mrs. Beatrice Lyon relative to what persons told her regarding the use of these products and to the testimony of Mrs. Lyon relative to the testimonial pictures shown to her, particularly the Court erred in making the following statement in front of the jury:

"Now, before any photograph can be offered in evidence of anything, it certainly must be shown to be the photograph and to justify its admission in evidence it must be shown to be what it purports to be. It seems to me that you have several hurdles to get over before you get such an item in evidence.

"We had better have this matter settled now so you get my views on it, I think.

"You would have to show when the picture was taken and identify the baby, the use of the remedy and probably the absence of other remedies, or, at least, some evidence in which it will be reasonably inferable that the condition at a later time was due to the remedy, and a lot of things like that before you can get it in evidence.

"In any event, there is no different rule from the ordinary rule and that is the identity of the picture showing what it purports to be, except those pictures are usually admitted on stipulation.

"But, otherwise, you would have to have the photographer to show the person who was photographed, it would seem to me."

Counsel, Mr. Kellogg, thereupon pointed out to the Court that it might be necessary to show that Mrs.

Alberty had seen the pictures, and after questioning the witness, who stated that Mrs. Alberty had seen the pictures, counsel finished his direct examination.

The foregoing statement by the Court was calculated to prejudice the jury on the question of good faith of the defendant.

22. That the Court erred in permitting the plaintiff to introduce a pamphlet, "Alberty's Treatment for Diabetes," as part of the cross examination testimony of the witness, Mrs. Beatrice Lyon, wherein the Court stated as follows:

The Court: Has the witness been clear on the proposition that she distributed the book?

Mr. Purdue: She has testified that they are in her department for distribution and they are on the counter, and it says "Take One" and it is like any other literature—when people come along, they take them.

The Court erred in permitting Mr. Purdue to read from Page 46 of said book over the objection of counsel and an exception noted at the conclusion of reading the following by Mr. Purdue:

"Ca-Mo.

"Calcium is essential to health and long life.

"Ca-Mo (formerly Calcatine) is of homeopathic origin, triturated with sugar of milk, which is a food instead of a talcum powder which is non-assimilative.

"Alberty's Ca-Mo helps to offset acidosis and 'Speeds up' cell reproduction by supplying a base for the new cells. Alberty's Food supplies the body with its daily need of calcium, and the more calcium supplied, the sooner one will recover health. The entire body feels its revitalizing

effects. Ca-Mo is especially beneficial and a valuable remedy in anemia, tuberculosis, all chronic or wasting diseases, swollen glands, ulcers, headaches, too rapid decay of the teeth, pimples, neuralgic rheumatism, prevents gall stones, acidosis, Bright's disease, goitre, pancreatic diseases, etc. Ca-Mo is not a medicine, but a valuable tissue and cell salts. Ca-Mo may be used alone or in conjunction with Alberty's Food, Lebara Pellets, Phosphate Pellets, or Alberty's No. 3 Tablets. $1.00 per bottle, six bottles, $5.50."

An objection was made and a motion to strike was made upon the ground the testimony was incompetent, irrelevant and immaterial and no proper foundation laid, and not within the issues and charges confronting the Court and the jury, and not within the issues of the information, and assigning it as highly prejudicial.

The objection was overruled. Exception.

23. That the Court erred in the course of a discussion concerning the introduction of the book in making the statement in front of the jury as follows:

The Court: The statement of the book itself is that Ca-Mo is merely another name for the remedy, is it not? (Referring to Calcatine.) It is my own impression from my glancing at the book. Doesn't it say so?

The foregoing statement by the Court might be calculated to impress the jury with the Court's impression of what the booklet contained, and to indicate that the defendant was still engaged in an open violation of the law, if she had been violating it at the time charged in the information. It was a statement that could not be overcome by the usual and customary objection, and no objection was made in the usual and customary manner.

24. That the Court erred in permitting Government counsel to read to the jury two paragraphs of the document over the objection and exception of the defendant from Government's Exhibit No. 13 in evidence as follows:

"The Alberty Treatment for Diabetes.

"The Alberty Treatment has proved very successful in diabetes with adults and children. It helps to renew the pancreatic cells which are atrophied and inactive, improves digestion and the metabolism of starches, fats and sugar.

"It proves a blessing to those who dread glandular injections and are forced upon a restricted, weighed diet.

"One of the most effective items included in the treatment is the vegetable compound capsules."

The said Exhibit No. 13 was objected to upon the ground it was incompetent, irrelevant and immaterial and not within the issues of the case; upon the further ground no proper foundation had been laid. It was further shown upon cross examination of Mrs. Lyons that neither of the exhibits mentioned in her direct examination, viz., Government's Exhibits Nos. 12 and 13, were enclosed in any package for sale; that they were separate and on the counter, and not part of the label sold in connection with the package in which any of the labels with which the charge of misbranding by the defendant was laid in the information.

25. That the Court erred in overruling the objection of the defendant to the following testimony upon cross examination of the defendant, Mrs. Beatrice Lyons.

Mr. Purdue: This literature has been used in the Broadway and sold right down to the present?

The Witness: It is.

It was objected to upon the ground that it was incompetent, irrelevant and immaterial what was being done at the present, as it was not a part of the charge.

The objection was overruled. Exception.

26. The Court erred in permitting the introduction of the testimony on cross examination of George Hyland over the objection and exception of the defendant as follows:

Q. You say you are under subpoena by the Government? You are still under, are you not?

A. I think so.

Q. Now, I will ask you if it isn't a fact that you yourself are now under indictment here in the federal Court for also selling cell salts as well as manufacturing them?

An objection was made upon the ground that it was incompetent, irrelevant and immaterial and not proper cross examination; that the man had not been shown to have been convicted of any offense. There followed the following discussion between the Court and counsel in the presence of the jury:

Mr. Purdue: It goes to the interest of the witness.

The Court: He has not been convicted, no, but he has not been asked that.

However, the interest and possible bias of a witness may also be shown. It is not a very nice thing to bring up the subject that a man is under indictment. That is distasteful, but at the same time, I see no reason why, as a matter of cross-examination, the witness should not be questioned concerning a situation which shows a possibility of feeling or bias.

Mr. Purdue: It is on an entirely different theory from anything like a commission of a felony.

Mr. Kellogg: I can understand that, your Honor, but I want to point out there was nothing from what I asked on direct examination to which counsel can take exception. If there is any misstatement, he could bring it out in cross examination. He can not go beyond stating that.

The objection was thereupon overruled.

The question was repeated, and the Court then stated as follows:

"Suppose you modify it to the extent that the witness is subject to some adverse procedure on behalf of the Government along the same lines. That is correct, isn't it?"

The witness was then called upon to answer and admitted that there was an information against him.

We note that the record discloses that there is no exception noted to the particular question, and it was overlooked in the heat of argument, but we feel it was so highly prejudicial to the defendant that the Court should have protected the defendant from such inquiry in view of the scope of the direct examination of the witness, and in view of the question immediately following wherein Mr. Purdue asked the witness as follows referring to the product for which he was under a charge by the Government:

Q. Yes, but some of the same preparation which you sold to Mrs. Alberty and which she designated as "Alberty's Liver Cell Salts"?

A. Correct.

27. The defendant further assigns as error the deliberate attempt of Mr. Purdue for the plaintiff in often and repeatedly, usually over the objection of the defendant, inquiring into the price she paid for her product from the manufacturer, and in repeating to the jury when reading from her book the price at which she sold the articles. We would point out although it is not a part of the record or transcription that throughout his argument counsel for the prosecution pointed out to the jury the tremendous profit made by the defendant; that that coupled with the evidence that was introduced, usually over the objection and exception of the defendant, was prejudicial error and prejudicial to the defendant.

In that connection we desire to assign as error the statement of counsel in his question to Mr. Hyland on cross examination where it was not proper cross examination as follows:

"And your price for cal-phos was, to her, $1.00 a pound, was it not?"

At that point the defense interposed with the statement as follows:

Mr. Kellogg: I assign that, your Honor, as prejudicial error, and ask that the jury be instructed to disregard it.

The Court struck the statement, but failed to instruct the jury to disregard it.

28. That the Court erred in not instructing the jury as requested by the defendant at the very time the Court struck the evidence to disregard the statement of Mr. Purdue in the cross examination he attempted to interpose regarding the price at which the product was sold in

his cross examination of Cecil Craig. In this connection we feel that the following questions and testimony are cogent and were prejudicial to the defendant.

Mr. Purdue: There are 7,000 of these cal-phos tablets in a pound, are there not, that you sold Mrs. Alberty?

A. Approximately.

Q. And you sold it to her at a little over $1 a pound, did you not?

Mr. Kellogg: Just a minute.

I object to that on the ground it is incompetent, irrelevant and immaterial and counsel knows it is and it can not be anything but an attempt upon his part to get error into the record, prejudicial error.

Mr. Purdue: It is proper to show the great profit in these.

Mr. Kellogg: He has tried throughout his examinations to get before this jury the fact that my client makes a profit. Of course, she makes a profit, but that is not the gravamen of this charge and has nothing to do with it and I cite it as prejudicial error and ask the Court to instruct the jury to disregard it.

Government counsel then persisted in front of the jury in making the further statement: "It goes, your Honor, to the good faith of the witness, the great profit this defendant makes in these things. She buys 7,000 for $1 and sells 150 for $1."

The Court: That is not the charge in the indictment. The fact that she does doesn't make any difference. It doesn't matter how much one makes. I regard the element of profit as an immaterial issue. The objection is sustained.

Mr. Kellogg: May I have the instruction asked?

The Court: The jury will, at the proper time, if they should need any instructions, be carefully instructed to the effect that they must disregard, among a lot of other things, evidence offered and not admitted, as well as evidence that has been admitted and later is stricken out. I do not think there is any necessity for making any special reference to it.

Mr. Kellogg: This, of course, is not evidence stricken out, but it is a remark of counsel in his question.

The Court: You do not think counsel is urging the question in good faith, I am sure, but the Court takes the opposite view. There is an objection, and it is sustained. Proceed.

The latter statement was made to defense counsel in front of the jury.

Mr. Kellogg thereupon asked for an exception to the ruling, and the Court granted it.

29. That the Court erred in directing the witness, George P. Larrick, to read the letter of December 15, 1928, addressed to the defendant and signed by C. W. Crawford where counsel for the defendant was examining Mr. Larrick, but was asking specific facts not requiring the reading of a letter; that said letter referred almost entirely to the booklets and other products of the defendant, and was not material to the issues, and in connection with the introduction of the booklet was highly prejudicial testimony.

While no specific objection or exception was noted to the order of the Court, the statement of the Court upon its own initiative that the letter should be read placed the

defendant in a position in front of the jury where an objection to the Court's act was hardly proper.

30. That the Court erred in its direction regarding the testimony to be introduced in behalf of the defendant by George P. Larrick wherein the Court asked as follows:

The Court: Is there anything in the law that makes it a duty of the Government to perform such functions for anybody? (Refe*r*ing to interrogation in behalf of the defense regarding Mrs. Alberty's attempt to secure an opinion from the Department or advice regarding revision of her labels.)

The statement, coupled with the further statement of the Court was objectionable. The further statement follows:

The Court: Of course, there is no objection by the Government, but it doesn't strike me that this testimony is relevant to anything before the Court. As I understand it, it is the business of those using or coming within the purview of the Food and Drug Act to see that they comply with the requirements. I do not think that there is any obligation on the part of any department of the Government to even assist them, but this matter went on to such a stage—whether justified or not, I am not saying anything about that—and the opinion was that it was useless to go further.

Now, as to what was done or said between the witness and anybody else, I fail to see that it is of particular importance.

However, we will let the matter go ahead.

31. That the Court erred in permitting Mr. Purdue upon cross examination of George P. Larrick as a witness for the defendant to introduce the following testimony over the objection and exception of the defendant:

Q. Please read your reference to Calcatine in the booklet which was told her to be objectionable, and practically as a whole.

Thereafter the objection was overruled.

The witness read as follows:

"Alberty's Calcatine.

"Calcatine is of homeopathic origin, triturated with sugar of milk, which is a food instead of talcum powder which is non-assimilative. While Alberty's Foods supply the body with food, it is the Calcatine which helps to make up the existing deficiency as we are all calcium starved.

"Calcatine speeds up cell reproduction and the whole body feels the revitalizing effects. The recovery of health will be more rapid as Calcatine acts as a tonic supplying the blood cells.

"Calcium phos is essential at all times in life for the nutrition of the body. It is found in the blood plasma and corpuscles, saline or gastric juices, bones, connective tissue, teeth, etc. It is great importance to the tissue promoting cell growth making it of inestimable value to both young and old. It has a special chemical affinity for albumen which forms an organism supplying this salt in the tissue cells.

"It is a valuable remedy in anemia, tuberculosis, or chronic and wasting diseases, swollen glands, ulcers, headaches, too rapid decay of teeth, pimples, neuralgic rheu-

matism, prevents gallstones, acidosis, Bright's disease, goitre, pancreatic diseases, etc.

"Calcatine is not a medicine but a tissue and cell salts."

The defendant objected to the introduction of the testimony upon the ground it was incompetent, irrelevant and immaterial, and no proper foundation laid and not within the issues of the case, and not proper cross examination.

The objection was overruled. Exception.

32. That the Court erred in sustaining the objection of the prosecution to the introduction of evidence concerning the use of Alberty's Food by Dr. William J. Geirman in the course of the examination of Dr. Geirman, because he had used Alberty's Foods and not the preparations named in the information. In this connection the defense pointed out that the booklet, "The Hourglass," contained a statement concerning Dr. Geirman, what he did, upon the theory that the statement in there was authorized and made in good faith, and that the booklet being introduced in evidence by the prosecution as an exhibit, it was within the province of the defense to introduce evidence to sustain statements made therein.

The objection to the introduction of testimony regarding testimonials in the booklet by Dr. Geirman was sustained.

33. That the Court erred in refusing the defendant the right to introduce evidence by witnesses, viz., Dr. William J. Geirman, Mrs. Genevieve Reynolds, Miss Helen Mikkone, Mrs. Hazel Reynolds, Francis Oliver, and Granvill Clarkson Bemis, all of whom were prepared to testify concerning the use of Alberty's Foods. The defense offered their testimony in support of statements made in the book-

let, "The Hourglass," which the Government had introduced into evidence, and the permission granted to the Government to introduce the booklet into evidence, coupled with its refusal to permit the defense to introduce evidence of the truth of the statements made in the book concerning some of the products, even though not mentioned in the information, deprived the defendant of a fair trial before the jury.

The defense noted an exception to the order of the Court striking the testimony.

34. That the Court erred in striking out all of the testimony of Iona Burgess Armor regarding her illness prior to 1925, and the attitude of the Court in voluntarily striking out all testimony of the witness before the year, 1925, coupled with the statements of the Court made to the attorney for defendant, constituted prejudicial error when made in front of the jury.

The testimony referred to and the statements of the Court referred to are as follows:

Q. Now, Mrs. Burgess, have you had a serious illness in the last eight or ten years?

A. Yes. The—

Mr. PURDUE (Interrupting) Just a moment. You answered it "Yes" and that answers the question.

Q. When was this serious illness of yours?

A. Well, the beginning began a little—of course, I couldn't say—yes, I can tell you, within the last ten years.

Q. When was it?

A. May I lead up to it a little?

Q. Yes.

A. As a child I was weak, had pneumonia and I lived up in Long Island a while, and I got malaria.

THE COURT: Just a moment, please.

Counsel, bring this down to some immediate time.

MR. KELLOGG; I am going to, your Honor.

THE COURT: Well, do it now.

BY MR. KELLOGG:

Q. How long did this malaria continue?

A. For some time. Then, I had Dengue Fever and didn't seem to get over it, just run down.

Q. That continued until when, Mrs. Burgess?

A. Well, I was in a run-down condition until about 1925 when I was here in Los Angeles and—

THE COURT (Interrupting) Strike out all testimony before 1925.

(To counsel for the defendant) Please obey the Court's instruction.

MR. KELLOGG: I am, your Honor.

THE COURT: I decline to accept your statement. It seems you are not. I am not questioning your intentions at all, but bring the witness down to something relevant, that is to say, her condition immediately.

Now, make the witness understand that. She is your witness. Otherwise, the Court will have to order her off the witness stand.

35. That the Court erred in its further comments on the testimony of Iona Burgess Armor, and said further statements constituted prejudicial error to the defendant, the same reading as follows: (The testimony of the witness, Iona Burgess Armor, referred to was as follows.)

Q. How long ago was the last picture taken?

A. Well, I think it was either the last part of 1925 or '26. It is quite a long time ago*o* just a few months after I had the first one.

Q. How did you happen to get the pictures taken?

A. Well, I felt so much better after two weeks, I went down to the Broadway and met a lady demonstrating the Alberty Foods and I told her—

MR. PURDUE (Interrupting) I object to that conversation.

THE COURT: Yes.

MR. KELLOGG: That is enough.

THE COURT: The inquiries in the first place, the assertions under which the picture was taken are certainly not important.

The foregoing statement when taken in connection with the attitude of the Court toward the witness, coupled with the entire attitude of the Court throughout the trial toward the defendant, constituted prejudicial error and prevented the defendant from having a fair trial before the jury.

36. That the Court erred in sustaining the objection of Government counsel to the testimony of the defendant, Adah Alberty, wherein she testified as follows:

Q. And I say now, after you abandoned that label, and prior to the time of the seizure, of those articles mentioned in the information, from U. S. Okey, had you made any arrangement regarding them?

A. I had.

Q. What arrangements had you made, and with whom?

A. Well, after I had talked to Dr. Hoover and these suggestions were made, and I had written them down, I went on to Philadelphia and I told Mr. Fry, who had charge of my stock there that I was sending some stock with new labels on that—

MR. PURDUE (Interrupting) Pardon me. It seems to me that her conversation with Mr. Fry is hearsay, your Honor.

The testimony of her conversation with Mr. Fry was objected to on the ground that it was hearsay and immaterial.

The objection was sustained.

(The foregoing testimony, together with the testimony following showing that the goods had been placed on the 5th floor was and would be material as showing that the defendant after she left the Department and prior to the seizure had withdrawn the goods seized from the market, all as bearing on the good faith of the defendant.)

37. That the Court erred in sustaining the objection of the Government counsel to the further testimony of Adah Alberty as follows:

Q. And have you got an itemized statement of the cost of that, together with the letter?

A. I have a letter, and I have also another letter saying that they didn't understand how the old stock wasn't returned to me as ordered.

(Referring to Thomas Martindale & Co.)

Q. Will you produce that document?

A. Yes.

(The document referred to was passed to Mr. Kellogg.)

MR. KELLOGG: I would like to offer that in evidence.

MR. PURDUE: Your Honor, I can't see where a letter from Martindale Company has any bearing on the case. It is hearsay and I object to it upon that ground.

THE COURT: Sustained.

The foregoing letter was important to the defense in that it tended to show that the defendant had given instructions to Martindale & Company to return some of the goods seized to her, showing that she had withdrawn them from the market after her conversation at the Department of Food and Drugs in Washington prior to the seizure, and was important as bearing upon her good faith. It was not offered as an authentic statement by Martindale & Company that she had ordered the goods off the market. While it was in the ordinary sense self-serv*ant*, nevertheless it went to the res gestae of the good faith of the defendant. When considered in connection with the general attitude of conducting the case throughout the trial, it was prejudicial to the rights of the defendant.

38. That the Court erred in striking the *state* of the witness, Adah Alberty, as follows:

Q. And as a result of that hearing do you know—how did you happen to make the last labels on there? (The Exhibit)

A. Well, the Government when they seized it the last time they objected to the name "Calcatine" and also objected to my putting the product on the market at all and said that it had no value and therefore that no label would be satisfactory, so then my attorney asked for an injunction against the Government and contended that it was a

difference of opinion between the allopaths and the homeopaths and that as it was a recognized homeopathic remedy the sale could not be interfered with.

MR. PURDUE: That seems to be hearsay, and I object to it.

THE COURT: The objection is sustained. Let the entire statement be stricken out. It is obviously entirely incompetent.

The testimony was competent to show the good faith of the defendant, to show that she had an attorney and that the attorney had told her certain things upon which she relied. The order of the Court striking such testimony was prejudicial to the defendant upon the element of good faith charged in the information.

39. That the Court erred in refusing to permit the introduction of a letter received by the defendant, Adah Alberty, and testimony concerning it, where such picture was contained in one of the exhibits, and where she testified as follows:

Q. Did you ever receive a letter from a Mrs. Thomas McCuenin?

A. I did.

Q. Did you write to her?

A. Yes, when I saw these pictures I wrote and asked her if she would send me a letter and tell me the baby's condition and let me use the pictures in a testimonial.

Q. Did you ever receive this letter as a result of that letter you wrote?

A. I did.

Q. You recognize the letter?

A. I do.

MR. KELLOGG: We would like at this time to offer the letter in evidence.

It was objected to upon the ground that it was shown on its face that it was dated in 1935, so it had no bearing upon the case.

THE COURT: That is the only ground of your objection?

MR. PURDUE: And upon the further ground that no proper foundation has been laid and it is incompetent, irrelevant and immaterial, and it is not shown to pertain to Alberty's Calcatine, Liver Cell Salts, or one of the other remedies for which the lady is being prosecuted.

THE COURT: Is that the only objection?

MR. PURDUE: And on the ground that it is—yes, your Honor, upon the ground that it is after the time mentioned in the indictment.

THE COURT: My understanding is that the only way writings can be introduced are through depositions and the law specifically permits the introduction of them. One person, totally disconnected from the case, might write somebody something, but I am not aware of any rule permitting that. I will be glad to hear you on that subject.

MR. KELLOGG: I am only offering the letter, your Honor, in connection with the pictures as substantiating Mrs. Alberty's belief that she was justified in using them.

THE COURT: That would not render them admissible and change the rule.

The objection is sustained.

Thereupon they were marked for identification as Exhibit L for identification.

MR. KELLOGG: Now, your Honor, it may save considerable time and examination if your Honor will disclose, without the necessity of first offering each of these testimonials to Mrs. Alberty, whether or not your Honor would apply the same ruling. I have here letters, testimonials regarding the products, and if your Honor will rule, then I may make an offer of proof as to these letters and have them ruled upon.

MR. PURDUE: I may say, your Honor, that I interpose no objection to letters which were receivee by the witness at or prior to the times mentioned in the *indictment,* and also which pertain to the product "Calcatine".

THE COURT: Very well, if the Government makes no objection, the Court certainly doesn't.

Does it come within the times mentioned?

MR. KELLOGG: This is December 5, 1932.

THE COURT: I am asking you.

MR. KELLOGG: IT is my understanding that it is prior to the seizure.

THE COURT: Mr. Purdue will answer. Look at it and see whether you have any objection to it.

MR. PURDUE (Examining document) I object to the letter dated July, 1933, as being after the times mentioned in the *indictment.*

MR. KELLOGG: Might I point out, Mr. Purdue, both letters are from the same individual.

MR. PURDUE: We are only concerned about the times mentioned in the indictment.

THE COURT: There is an objection?

MR. PURDUE: If the defendant testifies she received the letter dated December 5, 1932, I have no objection to its introduction.

THE COURT: Very well.

There is no objection on the part of the Government, although they are clearly incompetent, however, in any rule of evidence. The Court is not going to exclude them, however, if the Government consents to it.

The defendant refers to the language of the Court upon the offer of letters above mentioned as being prejudicial and contrary to the rule of evidence involved permitting the use of testimonials, and that the defendant was prejudiced by the remarks of the Court concerning testimonial letters above stated in front of the jury, over the objection and exception of the defendant. (The exception to the ruling of the Court was made late, and thereafter the Court struck from the record its order allowing or permitting the exception it not having been entered at the time of the ruling with the remark: "At this time the Court will strike any order allowing or permitting such exceptions, it not having been entered at the time. I am compelled to insist upon a little more discipline. The defendant, however, had asked for an exception to the ruling of the Court at the end of colloquy as will be disclosed by the Bill of Exceptions.)

40. That the Court erred in refusing to permit defendant's Exhibit L for identification to be introduced in evidence over the objection of the prosecution where it was shown that the letter was received by the defendant in the United States mail by the following testimony:

Q. Now, then, did you receive the letter that is marked "Exhibit L" in the United States mails?

A. I did.

Q. Did you rely upon that in any of your publications?

A. I did.

Q. Do you know whether or not the writer of the letter received and used "Calcatine"?

A. Well, she orders Calcatine.

Thereupon the letter was offered for identification.

There was an objection that the letter showed on the face it was dated June 1, 1935, after the time mentioned in the information.

The objection was sustained. Exception.

(It was claimed the foregoing letter was material because statements from it were contained in Government's Exhibit introduced over the objection of the defense.)

41. That the Court erred in refusing to permit the introduction of a letter from U. D. Haynes, dated July 29, 1933, to be introduced in evidence after the following testimony wherein Mrs. Alberty had previously stated that she had received defendant's Exhibit M. in the United States mails. It bore date of December 5, 1932.

Q. Now, did you receive any subsequent letter from Mr. Haynes?

A. I have received several letters from him.

Q. I will show a letter dated July 29, 1933, and ask you if you received that letter in the United States mail?

A. (Examining document) I did.

Q. And do you recognize the handwriting as the same on the letter just admitted in evidence?

A. I do.

Q. Do you know whether or not this letter mentions your Calcatine:

A. It does.

The letter was thereupon offered in evidence. It was objected to upon the ground that the letter showed upon its face that it was dated July 29, 1933, a date after the tioned mentioned in the *indictment.*

The objection was sustained. Exception.

42. That the Court erred in sustaining the objection of the Government to the introduction of a number of testimonial letters dated in 1933 over an offer of proof to introduce them on the ground that they were testimonials from persons who used the products, made in toto at one time for the purpose of saving the time of the Court over the following objection:

MR. PURDUE: I make the same objection, your Honor, upon the grounds heretofore interposed.

The objection was sustained. Exception.

The letters referred to were offered in support of the testimony of Adah Alberty. They were offered because a number of them appeared in publications introduced as exhibits for the Government over defense objection. They were important to the defendant because they would have shown that she had a number of persons who had actually received the benefits claimed from her products with which she was charged in the offenses named in the information.

43. That the Court erred in permitting Government counsel to repeatedly state in front of the jury both during the course of the evidence and by his argument that Mrs. Alberty made a tremendous profit from her products; by his entire conduction of the case, and the manner in which the Court itself conducted the case, all of which prevented the defendant from having a fair trial, all to her prejudice.

44. That the defendant was prevented from having a fair trial and was greatly prejudiced by the following statement of Government counsel during the course of his cross examination of the defendant:

Q. Now, Mrs. Alberty, I will ask you if you don't know it to be a fact, after you came to Los Angeles and the Alberty's Foods were distributed to infants here, that dozens upon dozens of babies were taken to the then City Health Department right across the street from this building and there had to be treated as a result of taking Alberty's Food?

A. Absolutely no. I never even heard of it.

Q. Because of the condition of their stomachs, vomiting profusely and other things? Do you not know that to be a fact?

The foregoing two questions were introduced into evidence without any attempt upon the part of the Government to introduce the records of the Health Department of the City of Los Angeles to support such a contention, and in fact while Government counsel well knew that there was no such evidence available; that the questions were not asked in good faith, but were asked for the purpose of creating a prejudice in the minds of the jury regarding the defendant, and discrediting her in front of the jury and for no other purpose. That said statements were highly prejudicial.

45. That the defendant assigns as error the permitting of Government counsel to question as part of the cross examination of the defendant into each and all of the products manufactured by her, viz., Alberty's Food, Radiumized sugar of milk, pleuri-gland tablets for men, pleuri-gland tablets for women, nerve food pellets, hemo-

globin tonic, Chino Restoration Tablets, Chini Combination Tablets, Chino Herb, Spleen and iron Tablets, Alberty's Food, regular, Instant Alberty Foods, Alberty's Instant, Old Style, Alberty's Phosphate, Alberty's Concentrated Vitamin D, and Alberty's Special Formula Tablets, and to then terminate his questions as to whether or not she manufactured all of the foregoing products with the statement as follows:

Q. $5.00 for 30 days?

The defendant assigns as prejudicial error cross examination by Government counsel where he went on and further asked if she manufactured Alberty's Laxative Blend, Cero-Fig Coffee Substitute, Alberty's Vegetable Anti-Diabetic Compound, each and all of them, and asked whether or not each one was homeopathic in its character; that all of the products except Alberty's Anti-Diabetic Vegetable Compound were not involved in the information, or any of its counts, and Government counsel was not sincere in examining the defendant in that connection nor did he act in good faith; that said questions were asked wholly to prejudice the minds of the jury and to create the belief that the defendant was engaged in the manufacture of a number of remedies of doubtful value or cure-alls of doubtful value, and that she was a person making a great profit from a medicine business, all of which was to the essential prejudice of the defendant's cause before the jury.

46. That the Court erred in permitting Government counsel to cross examine Mrs. Alberty as follows:

Q. I will ask you, Mrs. Alberty, if it is not a fact that in the year 1933, the year involved in this *indictment,* your profit from the sale of your various products was in excess of $20,000?

It was objected to as being incompetent, irrelevant and immaterial and not proper cross examination.

The witness thereupon stated in front of the jury, "I would like to answer."

The question was cited by counsel for the defense as misconduct upon counsel's part, and the court then made the statement as follows:

THE COURT: That was the view taken by the Court earlier. However, in view of the—might it not be an element as related to the question of good faith? In other words, if a great profit were made by a certain thing, would it not be competent and proper to show that where the question of the good faith or honesty or honest intentions of the witness is involved?

The Government counsel was admonished thereupon by the Court to confine his questions to the remedies named in the "Indictment", in the information.

Government counsel then modified his question as follows:

Q. Well, let me ask you what your profit was in 1932, upon the drugs involved in the indictment?

The question was corrected by suggestion of the Court to read drugs involved in the information.

The witness answered as follows:

THE WITNESS: Very small. I couldn't tell you the exact amount, but it cost me better than 50 per cent to sell, and out of the rest of it I had to pay taxes, traveling expenses and a big overhead at my factory, besides shipping and all my collateral advertising. I don't make 20 per cent.

BY MR. PURDUE:

Q. Now, let me ask you this: If you did not buy the vegetable compound from Mr. Sims at the rate of 62 cents a pound—

MR. KELLOGG (Interrupting) Just a minute.

MR. PURDUE (Continuing) —and that there was only about an ounce in the package which you would sell for $1.50?

MR. KELLOGG: Just a minute. I submit that the cost and sale is not a fair criterion and is inadmissible upon any theory, and I object upon the ground it is incompetent, irrelevant and immaterial and not proper cross examination.

THE COURT: The description is one of those mentioned in the information?

MR. PURDUE: Yes, your Honor.

THE COURT: The objection is overruled.

Thereupon the question was reread by the Reporter to the witness.

The witness answered as follows:

THE WITNESS: I don't know. I haven't the bills with me. I don't know how much I paid a pound. I know they sell at $1.50, but as I said, it costs me around 60 per cent to sell and I have to pay shipping, advertising and all other expenses out of it. I didn't make a lot of money. I didn't sell a lot of it in that year.

MR. PURDUE: As a matter of fact, these vegetables which you sold for $1.50 you would pay four cents for, wouldn't you?

A. I never calculated it.

Q. That is the amount that went into the package?

A. I never calculated it out. My bookkeeper does that.

The defense assigns all of the questions asked in the foregoing testimony in front of the *h*ury as highly prejudicial and while it appears that there was no exception noted to the Court's overruling of the objection of the defendant to part of the testimony, and while it appears that counsel necessarily withdrew his objection to other parts of it in the fact of his client's desire in front of the jury to answer, nevertheless, we feel that it was error to permit Government counsel to pursue his interrogation; that it was highly prejudicial to the defendant in view of the repeated attempts upon the part of Mr. Purdue to inject into the testimony the cost of the preparations and the price received for the sale, all of which constituted material prejudice to the defendant, and prevented her from having a fair trial upon the issues.

47. That the Court erred in volunteering the statement that the Court failed to see the relevancy of the evidence hereinafter set forth, and in its comments to counsel and to the witness as follows:

Q. Mrs. Alberty, how many members are there in your family?

A. I have *sic* married children.

MR. PURDUE: I can not see the purpose of the question, your Honor. If counsel states his purpose, maybe—

MR. KELLOGG (Interrupting) You asked if her family went to a physician when they were sick and I want to show how many there are, and that they are

grown up and what they went for. You opened it up. (Upon cross-examination.)

THE COURT: Yes. The question has been answered.

BY MR. KELLOGG:

Q. Now, then how many of them are married women?

A. Two.

Q. How many are married men?

A. Four.

THE COURT: I fail to see the relevancy of such evidence as that.

MR. KELLOGG: I am going to get right at it.

THE COURT: It seems to me that counsel asked her, did he not, if she called a doctor when some of her children were sick.

MR. KELLOGG: I am going to get right to it.

THE COURT: All right. Leave off such evidence as that. It is outside of any reasonable compass.

The foregoing statement of the Court, coupled with his general statements to witnesses for the defendant throughout the course of the trial evidenced an impatience toward such testimony as the defendant sought from time to time to introduce, and was prejudicial in the extreme to the defendant.

48. That the Court erred in making the following statement to the defendant, Adah Alberty, in front of the jury:

THE COURT: Never mind what the doctor did or said,—

THE WITNESS (Interrupting) And the—

THE COURT (Interrupting) A moment, please. Do not interrupt while the Court is speaking. That is not ordinarily considered good business.

The question has been answered sufficiently, and that is enough.

49. That the Court erred in denying the motion of the defendant that the following statement of the witness, Dr. George Hoover, called as a witness in behalf of the Government, in rebuttal, be stricken as a conclusion:

A. I don't recall specifically advising against any of the words in the statement, but I never would approve of the use of the word "acidosis" in connection with any product that is distributed to the public.

Upon a motion being made by the defense that the last statement be stricken as a conclusion of the witness, the Court stated:

THE COURT: Well, the Court understands he is an official of the Administration, is he not?

MR. KELLOGG: He is not, sir.

MR. PURDUE: He formerly was, your Honor.

THE COURT: He formerly was, and he speaks from his practice, I have no doubt.

The objection is overruled and the motion denied.

MR. KELLOGG: If your Honor please—

THE COURT (Interrupting) The Court's ruling has been made, sir.

The attitude of the Court at this point prevented counsel from again seeking to interpose an exception to the Court's ruling.

50. That the Court erred in denying the motion of the defendant to strike the following testimony of the witness, Dr. George Hoover, on rebuttal:

Q. Did you know the composition of any of the compounds?

A. I did not.

Q. Would you advise a person respecting a label when you did not know the composition?

A. I could not. I would not do that.

An objection was interposed that it was incompetent, irrelevant and immaterial and called for a conclusion of the witness.

The motion was denied.

51. That the Court erred in addressing the witness, Adah Alberty, defendant in the action, in the following manner:

THE COURT: A moment, please.

Mrs. Alberty, you seem disposed to be somewhat irregular in your manner on the witness stand. Your business is to answer the questions. If you desire to add anything by way of explanation, you are at liberty to do so. But, do not branch out on some different subject.

Read the question, Mr. Reporter.

(The pending question was read by the reporter, as follows:

"Q Did you receive the four letters which constitute that exhibit?"

THE COURT: That is a very plain question. Answer it yes or no*t*, and if you think it is necessary to make a further explanation, you may do so.

The Court's manner of addressing the defendant together with several of her witnesses combined to make the above mentioned statement of the Court highly prejudicial to the defendant and detrimental to her defense of the case before the jury.

52. That the Court erred in permitting the prosecution to introduce two letters, one dated May 15, 1935, and the other dated June 13, 1933, over the objection and exception of the defendant after the following testimony:

Q. Well, now, I again show you the two remaining copies of letters, one dated May 15, 1935, and the other dated June 13, 1933, and I will ask you if you didn't receive them?

A. (Examining documents) Well, these are the ones that I have no copies of at all. I couldn't identify these, and the way they are photostated, I couldn't read them.

Q. You wouldn't say that you did not receive them?

A. No; I don't know that I did, because I was away from my office a great deal when these letters were written on account of the automobile accident.

MR. PURDUE: We will offer the letters, the exhibit now for identification in evidence, your Honor.

There was an objection on the ground that they were incompetent, irrelevant and immaterial; that the letters were all dated subsequent to the dates alleged as a violation and charged in the information, and couldn't be material upon the issues of notice to her, the defendant.

The objection was overruled. Exception.

(The documents were received in evidence and marked "Government's Exhibit No. 15.")

53. That the Court erred in asking the counsel for the Government, Mr. Purdue, what the purpose of the letters was, and receiving the following reply:

MR. PURDUE: Your Honor, considerable time was consumed by the defendant yesterday in testifying to the fact that her whole course of dealing with the Department throughout was in good faith; that she tried to adopt their suggestions and that the Department acquiesced in those suggestions on up to 1934, as tending to show her good faith, throughout, in the course of the dealings with the Department, and at the times with which we are here concerned, and the only way we know how to meet that is by this correspondence.

THE COURT: I think it is material and relevant to the question.

The foregoing statements of the Court and counsel were highly prejudicial and detrimental to the defendant, and was a conversation in front of the jury, and would give the jury an impression that the letters were material and relevant when in truth and in fact the Government had repeatedly objected to letters introduced by the defendant subsequent to the time of the alleged offenses as incompetent, irrelevant and immaterial, and such letters had been by the Court excluded.

54. That the Court erred in permitting counsel for the Government to read the letters marked Government's Exhibit 15 over the objection of counsel that they were incompetent, irrelevant and immaterial; that they bore dates subsequent to the charges mentioned in the information; had no bearing upon the issues.

The objection was overruled. Exception.

55. That the Court erred in giving the following instruction to the jury after the jury had retired for deliberation at 3:05 P. M., and were returned at 5:25 P. M. for further instruction. The instruction objected to is as follows:

THE COURT: You asked, gentlemen: Are the labels in reference to counts 3, 4, 5, 6, and 7 shown in the counts in those counts revised labels applied to products seized and later released by the Government?

No, they are not. That procedure is this: Whenever goods are seized, at least goods of this character, if the matter is contested the defendant in the case is triee on the same issues as we try this one, as to whether or not it violates the Act. Then, if the judgment is in favor of the defendant, of course that settles it. The goods must be restored. If the judgment is in favor of the Government, there is a procedure, and the law permits that, under which the defendant may, by going through certain formalities, take the goods and re-label them, correctly label them.

Now, in this case, naturally, the first stage of the proceeding was reached only—and I think I am correct in saying this—that there was no re-labeling. That is, these goods involved in this suit were not released to the defendant.

MR. KELLOGG: Yes, your Honor, the evidence shows that they were.

THE COURT: Whether they were or not is a matter of no importance in this case at all. What happened subsequent to their seizure is of no importance in the case at all. The labels mentioned, that you are inquiring about, were the ones that were on at the time—that were on the

goods at the time of the seizure, and are not ones that were put on later. In other words, they were not revised labels. Do I make myself clear?

There was additional instruction given, but the foregoing contains the objectional features complained of by the defendant.

At the conclusion of giving the jury instruction at 5:30 P. M., and at the time they retired for further deliberation, counsel for the defendant asked permission to address the Court, and thereupon stated as follows:

MR. KELLOGG: The last instruction given the jury, your Honor, there you stated that they were to disregard all of the evidence concerning what was done after the seizure.

THE COURT: To do what?

MR. KELLOGG: That they were not to consider as evidence what was done after the seizure.

THE COURT: Not after the seizure. In fact, there is no evidence in the case when the seizure happened. Now, what I told them was that—I intended to tell them the fact that—the goods that were seized had no reference to the case and what was done with reference to the seizure, or the re-labeling, or that sort of thing, after the seizure, was of no materiality in the case.

MR. KELLOGG: That was said, and I had in mind all of the evidence introduced upon that point went to the good faith of the defendant.

THE COURT: Well, I don't see how. In the first place, is there any evidence in the case as to what was done after the seizure?

MR. KELLOGG, Yes, your Honor.

Following the foregoing the Court and counsel continued to discuss the instruction.

At the conclusion of the discussion by the Court and counsel, wherein counsel for the defense pointed out that the evidence introduced in the case in chief showing what happened to the goods and showing continuous transactions down until 1934, since it was in evidence, required an instruction that would cover the point to show there was no decree against the defendant in a former action.

The Court refused request of counsel for a further instruction regarding the effect of all of the testimony introduced both by the Government and controverted by the defendant of what happened after the seizure of the goods. The request was denied by the Court, and thereupon counsel asked, "May I have an exception for the record, your Honor?"

The jury was then in attendance and the Court could have recalled the jury, but the Court pointed out that the exception was supposed to have been in the presence of the jury, and counsel answered, "I thought that perhaps I ought to discuss it out of their presence.

Thereupon the jury returned at 6:15 P. M. with a verdict of guilty.

56. That the Court erred in making the following observation to the jury in the course of its original instructions:

"Now, the law under which this act is passed, or under which this prosecution is had, and after all, ge*h*tlemen, notwithstanding the impression that some people have, and, e*x*pecially, acts of Congress are written ordinarily in very plain and understandable English language and needs very little in the way of interpretation to those who are disposed to conform to them."

The foregoing statement referred to an argument of counsel, in the course of argument wherein counsel for the defendant had stated that the act was one that an ordinary person might not fully understand; that the evidence showed that the defendant had gone to the Department for advice, and had received advice from time to time; that the advice given by the Department was from time to time given the defendant, and it should be considered in considering the element of good faith.

While no exception was taken to the instructions, we assign it as error, and as part of the contention of the defendant that the Court generally turned the face of the jury in the direction of the defendant's guilt and not in the direction of the defendant's presumption of innocence.

57. That the Court erred in making the following observation to the jury in the course of giving it instructions, particularly the following passage read to the jury:

"At any rate, in a presidential message the then President of the United States used this language: (In a message to Congress.)

"In recommending the passage of the Act that we have before us, in my opinion, the sale of dangerous and adulterated drugs, or the sale of drugs under knowingly false claims as to have an effect in diseases, constitutes such an evil that it warrants me in calling the attention—calling the matter to the attention of the Congress. Fraudulent misrepresentations of the curative value of those drugs not only operates to defraud the purchasers but is a distinct menace to the public health. There are none so credulous as sufferers from disease. It necessitates legislation which will prevent the raising of false hopes of speedy cures of serious ailments by misstating the

effects of worthless mixtures on which the sick will rely while their diseases progress unchecked."

After quoting the above, the Court stated as follows:

"I have selected that because, while it is not, perhaps, strictly necessary, it is enlightening as to the genesis or origin and foundation of this law and expresses very clearly the reason for its adoption."

The foregoing observation was not excepted to at the time by counsel for the defense, but it is assigned as error upon the part of the Court as being part of the acts of the Court in turning the face of the jury in the general direction of the defendant's guilt, and not toward the presumption of innocence of the defendant. For that reason we believe that the observation was part of the conduct of the Court that prevented the defendant from having a fair trial before the jury. It should be considered.

58. That the Court erred in denying the motion of the defendant for a new trial. The denial of the motion for a new trial was an abuse of discretion upon the part of the Court, the grounds for a new trial being argued before the Court on Monday, December 14, 1936.

Under all of the evidence introduced in favor of the Government and the defendant, there is no evidence showing beyond a reasonable doubt that the defendant was in any event guilty, and it affirmatively appears that the Court erred in permitting the introduction of evidence concerning booklets and literature which were not a part of the offenses charged, all at the instance of the Government.

59. That the Court erred in denying the motion in arrest of judgment made by the defendant upon the ground that the evidence construed most strongly against

the defendant, failed to prove beyond a reasonable doubt that a crime had been committed as charged in the information, or that the evidence showed beyond a reasonable doubt that the defendant was guilty of any crime whatsoever. That the evidence failed to show that the defendant was guilty of a crime charged in any of the counts of the indictment beyond a reasonable doubt.

60. That the Court erred in assessing a fine of $100.00 on each of the counts of the information with which the defendant was found guilty for the reason that each of the offenses charged embodies what is in truth and in fact a *serious* of what may be said to constitute a single offense; that the assessment of a total fine of $1,000.00 against the defendant for the several counts of the information upon which she was found guilty was in any event excessive. That the awarding of costs to the Government was not warranted, and that the fine together with costs totaling in excess of $2,000.00 is cruel, unusual and unwarranted punishment and not in line with the general policy of the Government and violates the constitutional rights of the defendant in that regard.

WHEREFORE, the appealing defendant, Adah Alberty, prays that by reason of the errors aforesaid and contained in these assignments of error that the judgment and sentence imposed against her be reversed and held for naught.

KELLOGG & MATLIN
By HIRAM T. KELLOGG
ATTORNEYS FOR DEFENDANT, ADAH ALBERTY.

[Endorsed]: Filed Feb 13 1937 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[Title of Court and Cause.]

BAIL BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, Ada Alberty, of the County of Los Angeles, as principal and the National Automobile Insurance Company, a corporation, as surety, are jointly and severally held firmly bound unto the United States of America in the sum of One Thousand ($1,000.00) Dollars, for the payment of which said sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

WHEREAS, lately, to-wit, on the 14th day of December, 1936, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending in the said Court in which the United States of America was plaintiff and Ada Alberty was defendant, a judgment and sentence was made, given, rendered and entered against the said Ada Alberty, in the above entitled action, whereas she was convicted as charged in the Information.

Whereas, in said judgment and sentence, so made, given, rendered and entered against said Ada Alberty, she was by said judgment sentenced to pay a fine of One Hundred ($100.00) on each of the ten counts of the Information, a total of One Thousand ($1,000.00) Dollars and stand committed until paid.

WHEREAS, the said Ada Alberty has filed a notice of appeal from the said conviction and from the said judgment and sentence, appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and

WHEREAS, the said Ada Alberty has been admitted to bail pending the decision upon said appeal, in the sum of One Thousand ($1000.00) Dollars.

NOW, THEREFORE, the conditions of this obligation are such that if said Ada Alberty shall appear in person, or by her attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute her appeal; and if the said Ada Alberty shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit and if the said Ada Alberty shall surrender herself in execution of said judgment and sentence, if the judgment and sentence be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit; and if the said Ada Alberty will appear for trial in the District Court of the United States, in and for the Southern District of California, Central Division, on such day or days as may be appointed for retrial by said District Court, if the said judgment and sentence against her be reversed,

Then this obligation shall be null and void, otherwise to remain in full force and effect.

Ada Alberty
PRINCIPAL

729 Seward St. Los Angeles
ADDRESS

NATIONAL AUTOMOBILE INSURANCE COMPANY

[Seal] By N. L. Goodspeed
Attorney-in-Fact.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

On this 14th day of of December, A. D. 1936, before me, SOPHIE HACKERMAN, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared N. L. GOODSPEED, Attorney-in-Fact of the National Automobile Insurance Company, to me personally known to be the individual and officer described in and who executed the within instrument, and he acknowledged the same, and being by me duly sworn, deposes and says that he is the said officer of the Company aforesaid, and the seal affixed to the within instrument is the corporate seal of said Company, and that the said corporate seal and his signature as such officer were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City of Los Angeles, County of Los Angeles, the day and year first above written.

[Seal] Sophie Hackerman
Notary Public in and for the County of
State of California
My Commission Expires Apr. 3, 1938.

APPROVED AS TO FORM AS A BAIL BOND
PEIRSON M. HALL
United States Attorney
By Howell Purdue
Ass't United States Attorney.

I hereby certify that I have examined the within bond and that in my opinion the form hereof is correct and surety thereon is qualified.

Hiram T. Kellogg
Attorney for Defendant and Appellant

The foregoing bond is approved this 14th day of December, 1936.

Leon R. Yankwich
United States District Judge.

[Endorsed]: Filed Dec 14 1936 R. S. Zimmerman, Clerk, By J. M. Horn, Deputy Clerk.

[Title of Court and Cause.]

STIPULATION

IT IS HEREBY STIPULATED by and between counsel for the parties hereto, through their respective counsel, that such of the original exhibits in this cause as are not contained in detail in the Bill of Exceptions herein, may be certified by the clerk of the United States District Court for the Southern District of California to the United States Circuit Court of Appeals for the Ninth Judicial Circuit as a part of the evidence in the above entitled cause; and that counsel for the respective parties herein shall designate to the Clerk of the said District Court the exhibits to be certified by him to the United States Circuit Court of Appeals.

DATED this 11th day of March, 1937.

PEIRSON M. HALL,
United States Attorney

By M. G. Gallaher

KELLOGG & MATLIN

By Hiram T. Kellogg

Attorneys for Defendant, Mrs. Adah Alberty.

[Endorsed]: Filed Mar 11 1937 R. S. Zimmerman, Clerk By J. M. Horn Deputy Clerk.

[Title of Court and Cause.]

STIPULATION

IT IS HEREBY STIPULATED by and between the parties to the within proceeding through their respective counsel that the foregoing bill of exceptions contains all of the evidence in condensed and narrative form given on the trial of the above entitled cause, and correctly shows all of the proceedings had prior to and during said trial, and said bill of exceptions is correct in all respects, containing all matters occurring at the trial except those colloquies between Court and counsel expressly stricken on motion by the trial court.

IT IS FURTHER STIPULATED that the printing of the exhibits as part of the bill of exceptions being impractical, the original exhibits may be certified by the trial court to the Circuit Court of Appeals in lieu of printing the same as part of the bill of exceptions.

DATED this 11 day of March, 1937.

PEIRSON M. HALL,
United States Attorney
By M. G. Gallaher

KELLOGG & MATLIN
By Hiram T. Kellogg
Attorneys for Defendant, Mrs. Adah Alberty.

[Endorsed]: Filed Mar 11 1937 R. S. Zimmerman, Clerk By J. M. Horn Deputy Clerk.

[Title of Court and Cause.]

ORDER

IT IS HEREBY ORDERED that such of the exhibits mentioned in the bill of exceptions filed herein that counsel for the respective parties herein find impracticable to incorporate in the said bill of exceptions may be certified to the Ninth Judicial Circuit as a part of said bill of exceptions, and the Clerk of this court be and he hereby is directed to certify to the United States Circuit Court of Appeals for the Ninth Circuit all such original exhibits herein which are not incorporated in said bill of exceptions as a specific part thereof, the said exhibits to be designated by the counsel for the respective parties herein.

DATED this 11th day of March, 1937.

Geo. Cosgrave
UNITED STATES DISTRICT JUDGE

[Endorsed]: Filed Mar 11 1937 R. S. Zimmerman, Clerk By J. M. Horn Deputy Clerk.

[Title of Court and Cause.]

PRAECIPE

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

Please prepare transcript of record on appeal in the above entitled matter and include therein the following:

1. Copy of the information, together with the Exhibits attached thereto.

2. Minutes showing arraignment and plea of the appealing defendant.

3. Minutes showing the trial began on the 3rd day of December, 1936; minutes showing motions made by defendant during the course of trial; minutes showing that prosecution rested its case on the 10th day of December, 1936.

4. The verdict as to the appealing defendant.

5. Copy of the written motion for a new trial made by the defendant.

6. Copy of the written motion in arrest of judgment made by the defendant

7. Minutes showing the ruling of the Court upon motion for a new trial and motion in arrest of judgment, showing a denial of the same on the 14th day of December, 1936.

8. The judgment and sentence of the Court.

9. The bond on appeal of the appealing defendant.

10. The bill of exceptions and stipulation of counsel agreeing to the settlement of the same; and the Order of the Court approving and allowing the same.

11. The assignments of error.

12. Stipulation and order of Court for certification of exhibits to the United States Circuit Court of Appeals.

13. In preparing the foregoing record, eliminate the title of the Court and cause and endorsements except the Clerk's filing marks, and the endorsements showing the presentation of the bill of exceptions to the trial court.

14. All other records usually and properly included in a transcript of record on appeal in accordance with Section IX of the Act of March 8, 1934, amending Act of February 24, 1933, prescribing rules of practice and procedure in criminal cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia.

DATED this 12th day of March, 1937.

KELLOGG & MATLIN

By David A. Matlin

Attorneys for Defendant, Mrs. Adah Alberty.

[Endorsed]: Filed Mar. 15, 1937 R. S. Zimmerman, Clerk By J. M. Horn, Deputy Clerk.

[Title of Court and Cause.]

STIPULATION

IT IS HEREBY STIPULATED by and between counsel for the parties hereto, through their respective counsel, that the exhibits attached to the original Information on file herein and which is to be part of the record on appeal may be eliminated and withdrawn from the said record on appeal.

DATED this 30th day of April, 1937.

PEIRSON M. HALL,
United States Attorney

By Howell Purdue,

KELLOGG & MATLIN

By Hiram T. Kellogg

Attorneys for Defendant, Mrs. Adah Alberty.

[Endorsed]: Filed May 1, 1937 R. S. Zimmerman, Clerk, By J. M. Horn, Deputy Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 288 pages, numbered from 1 to 288 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the statement of docket entries; information; order of January 14, 1935 showing arraignment and plea; order of December 3, 1936 showing the trial began December 3, etc.; order of December 10, 1936 showing that prosecution rested its case; verdict; motion for a new trial; notice of motion for arrest of judgment; order of December 14, 1936 denying motion in arrest of judgment and denying motion for a new trial, and sentence; bill of exceptions; notice of appeal; assignment of errors; bail bond on appeal; stipulations re exhibits contained in bill of exceptions, and bill of exceptions; praecipe and stipulation re exhibits attached to information.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is hereby enclosed, also that the fees of the Clerk for comparing, correcting and certi-

fying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of May, in the year of Our Lord One Thousand Nine Hundred and Thirty-seven and of our Independence the One Hundred and Sixty-first.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.